MISSISSIPPI LAW JOURNAL

JUDGING THE JUDGES—THE TECHNIQUES OF JUDICIAL DISCIPLINE

William F. Winter

MISSISSIPPI JUDICIARY COMMISSION— A SYNOPSIS

Mary Libby Payne

CONSUMER PROTECTIONS UNDER THE UNIFORM CONSUMER CREDIT CODE

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LEGAL STATUS OF THE MENTALLY RETARDED AND MENTALLY ILL IN MISSISSIPPI

James W. Mann and Gene Parker

Winter 1969

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Mississippi Law Journal

VOLUME XLI WINTER 1969 NUMBER 1

JUDGING THE JUDGES— THE TECHNIQUES OF JUDICIAL DISCIPLINE

*William F. Winter**

> What this great mass of so-called "little people" have sense enough to realize is that our liberties and our way of life can only be preserved by a calm, unemotional and dignified running of our judicial system by men of loyalty and sincerity who call them as they see them coming over the plate.
>
> . . . .
>
> . . . I discovered that the people of America truly love their judges. They honor and revere their judges and hold them close to their hearts. Never forget this; and never let them down. And remember too that the so-called "little fellow", who really is America in the aggregate, doesn't like judges who shout at him or bang their gavel, and he doesn't like to be kicked around.
>
> . . . .
>
> . . . Sitting there from day to day with that grand old flag just over one's shoulder really does something to you. Above all it teaches one humility, the greatest quality a judge can have.[1]

Thus Judge Harold Medina, one of this era's best-known and most respected jurists, said it for and to his judicial colleagues in an address to the Section on Judicial Administration of the American Bar Association in 1951. A great deal of water has gone over the judicial dam since then, and the conflicts and crises of American life have increased in many ways. There are today new challenges to the orderly processes of which Judge Medina was a dramatic personification, but the lessons

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[1] Medina, *Some Reflections on the Judicial Function: A Personal Viewpoint*, 38 A.B.A.J. 107, 110 (1952).

pointed up in the nine-month Communist conspiracy trial[2] over which he presided make it clear that it is our system of jurisprudence that is best equipped of all of our institutions to see us through the monumental conflicts now swirling around us.

But because the problems now loom larger and the role of the courts in sustaining the concept of the majesty of the law becomes increasingly difficult, every citizen and particularly every lawyer has a duty to help see to it that the system operates as well as it can. And to do this, it is essential that the men and women who make up the judiciary at all levels and in every situation perform as well as they can.

This means quite simply that under the leadership of the bar there must be devised those administrative and procedural improvements that will enable our judicial system to function at its maximum efficiency, and it also means that within that system each court and each judge must function in a manner that will result in proper respect by the individual citizen for legal processes and a willingness to observe those processes. It is the purpose here to point out one specific area that is believed to be a necessary element in sustaining the ability of the judiciary to command that adequate measure of public respect. That lies in an improved process of judicial discipline that will make more certain that in those situations where we have faithless, insensitive or incompetent judges, we have an efficient way of getting them off the bench or, at least, of improving their performance on it.

It has been one of the paradoxes of our system of government that in the judicial branch, where greater precision is generally supposed to exist than in any other, there has frequently been found very little administrative order and consistency.

This anomaly is explained in part, of course, by the understandable reluctance on the part of those outside the judiciary to do anything that would interfere with the maintenance of an independent judiciary or that would tend to subject it to the whims and passions of public opinion and to the cynical pressures of political partisanship. Insofar as judicial discipline is concerned, this has meant that by and large the judiciary has occupied an area that has generally been outside the scope of normal supervision and oversight except in those rare cases where the ponderous and laborious machinery of impeachment has been brought forward to handle cases where obvious and serious transgressions have occurred. But, as was pointed out almost a century ago, "Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to

[2] United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).

aim at."[3] In the years before and since those words were written, it has been obvious to the most casual observer that there have been many instances of judicial impropriety, some of which have gone unremedied simply because of the absence of any reasonable corrective procedures.

Now under the pressure of a public and a bar that are growing increasingly restive over inadequacies and inefficiencies in the administration of justice, more and more states are turning their attention to the problem of increasing the efficiency of the judicial disciplinary process. One of the specific areas to which this attention is becoming increasingly directed is in the formulation of a system of judicial discipline that will result in the improvement or elimination of that small minority of judges who have taken advantage of their positions to bring disfavor to themselves and to the system of American jurisprudence.

The national indignation which attended the recent disclosures about and resulted in the resignation of a member of the United States Supreme Court, the evidence of other judges engaging in activities representing a possible conflict of interest, and the indifference of others to the responsibilities and conscientious attention to the duties of their office have added impetus to the movement to improve the machinery whereby the judiciary can be freed of the onus and the inefficiency that this type judge brings to it.

At this point it is well to consider the general guidelines that the legal profession has established for the conduct of judges. These standards have been the subject of recent discussion and President Bernard G. Segal of the American Bar Association, at the 1969 meeting of the Association in Dallas, expressed the opinion that the Canons were in need of revision, "[e]ntirely apart from the unfortunate, highly publicized events of recent months . . . ."[4]

It should be of interest to consider what the Canons relating to judicial conduct provide. These are the rules adopted in 1924 when the Association formulated its Canons of Judicial Ethics. Canon 4 states the broad general rule with respect to a judge's position in the following language:

> A judge's official conduct shall be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.[5]

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[3] 1 J. Bryce, The American Commonwealth 208 (1888).

[4] Editorial, 55 A.B.A.J. 843 (1969).

[5] ABA Canons of Judicial Ethics No. 4.

Canon 24 has to do with the matter of inconsistent obligations of judges and reads as follows:

> A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.[6]

Canon 25 provides guidance to judges in matters relating to business promotions and solicitations for charity. It is in this area that some judges carelessly allow themselves to be placed in positions which, while seemingly innocuous at the outset, lead to all sorts of conflicts both from the standpoint of time as well as economic interest. This Canon reads as follows:

> A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter any business relation which, in the normal course of events reasonably to be expected, might bring his personal interests into conflict with the impartial performance of his official duties.[7]

Canon 26 has to do with personal investments and relations. This poses a particularly thorny problem for many judges who have come to the bench out of an active and aggressive business background. The fact of the matter is, though, that if one is not willing to forego the role of trader or speculator in the market place, he should not don the robes in the first place. Canon 26 is couched in the following language:

> A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

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[6] *Id.* No. 24.

[7] *Id.* No. 25.

> He should not utilize information, coming to him in a judicial capacity, for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.[8]

The Committee on Professional Ethics of the American Bar Association has in recent months given considerable attention to the question of "ethical propriety" related to personal, social and business activities of judges. In an opinion arising out of the Fortas matter on May 18, 1969, the Committee went into a rather lengthy redefinition of many facets of the Canons and concluded its report in these words:

> In view of the Judicial Canons and the opinions herein referred to, the Committee feels that a judge or justice should not undertake any obligations or enter into any relationship of any kind or nature whatsoever which might in any way be inconsistent with his duties and obligations as a judge or which in any way might point to impropriety on the part of a judge.[9]

It is obvious though, as Mr. Segal has pointed out, that the Canons, while stating general principles with which few could disagree, still leave much room for controversy and indecision as to whether a specific judge's conduct is inconsistent with such Canons. The point is that the Canons do not mean the same thing to different judges, and every lawyer can cite examples of judges engaging in various kinds of business activity that, without stretching the imagination too much, could result in serious conflicts of interest in the rendering of decisions from the bench.

Chief Justice Warren Burger has spoken quite strongly of his concern for the elimination of any appearance of conflict of interests on the part of judges. He is aware, of course, that the ability of the Supreme Court or any other court to sustain support and respect for its decisions and its judicial principles is based on the maintenance of adequate public respect for the Court. This can be achieved only if the public genuinely and sincerely believes that the Court is in fact above reproach as far as the individual conduct of its members is concerned. This reputation can be achieved only as each member of the Court is willing to subject his private and personal life to the limitations that his official role requires.

In an editorial in its July 1969 issue, the American Bar Association Journal stated the issue in the following terms:

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[8] *Id.* No. 26.

[9] Opinions of the Committee on Professional Ethics, 55 A.B.A.J. 666, 668 (1969).

> In a nation that prides itself on devotion to the rule of law, where all men, of high or low station, are answerable to the law, the judges who administer that law must be above reproach and beyond suspicion. The legal profession has a duty to protect and defend the courts as institutions . . . . If this function is to be fulfilled by the Bar, it has the right to expect impeccable conduct from those who serve on the courts.[10]

All of this reflects the measure of responsibility that attaches to assuming the obligations of a judge. One cannot take too lightly these responsibilities, and the system must insist that judicial propriety be made a universally understood principle and that there be standards of performance adopted that are susceptible of being clearly interpreted and implemented. The judicial process is now entirely too complex and reaches into too many areas of life to be left purely to the individual sense of restraint or compliance, as may be determined by the individual judge. This is where the system has tended to break down. This is where an adequate supervisory process needs to be established that will insure that the public is more adequately protected from those whose sense of responsibility on the bench may not be adequate of itself.

The history of efforts at creating a system of judicial discipline is shrouded in controversy and masked by the clumsy early efforts to equate political differences with dereliction of duty. The most notable of these abortive efforts had to do with the impeachment of Associate Justice Samuel Chase of the United States Supreme Court in 1804-05. Following what appears to have been a partisan conviction of United States District Judge John Pickering of New Hampshire, the House of Representatives sought the impeachment of Justice Chase based on his alleged inflammatory charges to a grand jury in Maryland and to his allegedly overbearing and sarcastic manner in court. It was apparent, however, the Justice was being tried more for his decisions than for his derelictions, and the result was that the United States Senate, after hearing fifty-two witnesses, acquitted him and established, apparently once and for all, that Congress does not have a constitutional right to strip a judge of his office, except for criminal conduct.[11]

It is generally conceded by historians that had Justice Chase not been acquitted, other members of the Supreme Court at that time, including Chief Justice Marshall, who were not in tune with the incumbent administration, would probably have been subjected to impeachment proceedings. In fact, Marshall was so alarmed over the prospects

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[10] Editorial, 55 A.B.A.J. 648-49 (1969).

[11] 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 157-222 (1929). *See also* Blackmar, *The Impeachment Trial of Samuel Chase*, 48 J. AM. JUD. SOC'Y 183 (1965).

of impeachments prior to the Chase trial that in a letter to Chase on January 23, 1804, he made the following suggestion for an alternate procedure, which in retrospect seems amazing for one who had written the opinion in *Marbury v. Madison*:

> According to the antient [sic] doctrine a jury finding a verdict against the law of the case was liable to an attaint; & the amount of the present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment.
>
> As, for convenience & humanity the old doctrine of attaint has yielded to the silent, moderate but not less operative influence of new trials, I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.[12]

This case, probably more than any other, established the general concept of the independence of the judiciary, and marked the beginning of a tradition that has seen the other branches of government reluctant to intrude on the prerogatives of the judicial branch. It is unfortunate that this issue was initially drawn in so partisan an atmosphere, for the net effect has undoubtedly been to make it more difficult to frame a system of judicial discipline without seeming to impinge on the independence of the courts.

Not all of the awkwardness and inconsistency in the handling of judicial discipline cases through impeachment have been confined to the federal judiciary of the early nineteenth century, however. A num-

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[12] 3 A. BEVERIDGE, *supra* note 11, at 177. In his biography of Marshall he comments on this suggestion as follows:

> Marshall thus suggested the most radical method for correcting judicial decisions ever advanced, before or since, by any man of the first class. Appeals from the Supreme Court to Congress! Senators and Representatives to be the final judges of any judicial decision with which a majority of the House was dissatisfied! Had we not evidence of Marshall's signature to a letter written in his well-known hand, it could not be credited that he ever entertained such sentiments . . . .
>
> The explanation is that Marshall was seriously alarmed. By his own pen he reveals to us his state of mind before and on that dismal February day when he beheld Samuel Chase arraigned at the bar of the Senate of the United States. During the trial Marshall's bearing as a witness again exhibited his trepidation. And, as we have seen, he had good cause for sharp anxiety.
>
> Had he been indifferent to the peril that confronted him and the whole National Judiciary, he would have exhibited a woeful lack of sense and feeling. He was more than justified in resorting to any honorable expedient to save the great office he held from occupancy by a resolute and resourceful foe of those Constitutional theories, the application of which, Marshall firmly believed, was indispensable to the sound development of the American Nation. *Id.* at 178-79.

ber of states in recent years have had some very sticky problems with respect to one or more members of their judicial branch. It will not be within the scope of this article to go into the circumstances of the various specific cases.

It is significant, however, that progress in upgrading the procedure for handling such cases seems to have come more quickly in a number of jurisdictions where there have been specific instances of judicial misconduct. A case in point is the State of Oklahoma where, following the unhappy sequence of events that saw two justices of the Supreme Court resign from the court under charges of bribery and another justice removed from office by impeachment, the voters adopted a constitutional amendment in 1966 by almost a three-to-one vote to provide for the establishment of a Court on the Judiciary. This was in contrast to the result two years earlier when the measure had been defeated in a similar referendum.[13]

Public reaction in Florida was much the same following two lengthy and expensive impeachment proceedings involving judges in that state. It was estimated by Chief Justice E. Harris Drew of the Florida Supreme Court that the two trials, both of which incidentally resulted in acquittals, cost approximately a quarter of a million dollars. Judge Drew, who presided at one of the trials, expressed his disenchantment with the process in the following language:

> Perhaps the most serious fault with the present system is that the charges must be either sustained and the accused found guilty and thereby stripped of his office and disqualified to hold any office of honor, trust or profit under the state or he must be acquitted. There is no middle ground. Impeachment does not embrace the concept of intermediate punishment such as suspension, fine or reprimand. I am convinced that most trials of impeachment could have been prevented had there been an authority with the power to reprimand, fine or suspend a judge for misconduct in office. I am confident that if there were a commission vested with such power, most cases could be finished before they ever reach a point of requiring severe action.[14]

Voters thereafter adopted a constitutional amendment in 1966 which has resulted in the creation of a Judicial Qualification Commission.

It is obvious from the experience of many years of less than satisfactory handling of these problems that a more realistic approach needs to be adopted by more states with respect to the process of judicial dis-

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[13] *See* Hays, *An Oklahoma View—The Discipline and Removal of Judges*, 50 J. AM. JUD. SOC'Y 64 (1966).

[14] Dunn, *Impeachment System Goes on Trial*, Tampa Tribune, Jan. 19, 1964.

cipline if the best interests of the bench, the bar, and the public are going to be served.

Maintaining a free and independent judiciary is, of course, the primary consideration that is involved in any program related to the creation of such a system. For as has already been pointed out and as even the most unsophisticated student of politics knows only too well, without proper safeguards, the courts can be and at times have been made pawns of calculating and capricious politicians. The key, therefore, is to find a procedure that will insure the maintenance of the ultimate independence of the judiciary and enable it to operate effectively in an atmosphere free from political pressures, while at the same time protecting the public, the bar, and other members of the judiciary from the administration of justice by judges who by their actions have demonstrated themselves unfit to judge. The record clearly shows that the massive machinery of impeachment is not adequate to deal with the majority of cases in this area. It is slow, awkward, partisan, expensive, and ineffective.

Nor are the other traditional common-law procedures of address and recall adequate very often to handle effectively the problems of judicial dereliction.

In formulating any sort of disciplinary system, there must exist a proper understanding of the standards for judicial conduct. The very nature of the judge's relationship to the bar and to the public and the ever-present possibility that he will be called upon to decide cases involving former business associates, close friends, and powerful economic interests make it absolutely essential that a judge isolate himself from relationships and associations that could create even the appearance of a conflict of interest. At the same time he must recognize that at all times he is a servant of the people and owes the public his most diligent performance. Among the causes for disciplinary action, therefore, may be included the failure to observe proper diligence in work standards, the unwillingness to follow standard rules of procedure, failure to submit accurate reports, overbearing behavior, failure to hand down decisions in a timely manner, and drunkenness, plus the more serious offenses that would involve moral turpitude and financial impropriety.

Granted that there is need for a disciplinary procedure short of impeachment in most of these cases, the question arises as to how the procedure should be initiated. In other words, who will bell the cat? Who should have a right to bring a complaint against a judge? Should it be confined to the Bar Association, or should citizens, individual lawyers, other officials, or other members of the judiciary be included among those able to bring a complaint? What kind of investigation should be made, should the investigation be private or public, and who

should conduct the investigation? Finally, who should have the final decision in judging a judge? These questions indicate the sort of thicket that one gets into in considering the processes of judicial discipline. The one thing that is generally agreed on is that the old system of impeachment or criminal prosecution is not adequate, and something better needs to be devised.

The search for new procedures in this regard has been going on for a number of years, but the first significant step took place in 1947, when the State of New York adopted a constitutional amendment providing for a Court on the Judiciary.[15] Under this concept, a special court could be convened to hear complaints against a judge when such complaints were filed by certain designated officials. This was followed by an even more realistic plan in 1960 when the State of California created the California Commission on Judicial Qualifications.[16] It is these two concepts that seem now to provide the best machinery for the most effective administration of disciplinary action against incompetent or faithless judges.

The chief differences between the Court on the Judiciary and the Judicial Qualifications Commission lies in the greater flexibility and latitude of the latter. The Court on the Judiciary is comprised solely of judges from the appellate and trial courts, and normally only certain named officials may initiate charges. The proceedings usually conform to those of a trial, with appeal to the State Supreme Court granted in those states where the Supreme Court itself does not constitute the Court on the Judiciary. In any event, under this system the State Supreme Court is really the body that plays the major role in administering the disciplinary procedures and has the final authority for removal upon a finding of guilt.

The Judicial Qualifications Commissions now appear to be in greater favor and are becoming more widely adopted than the Courts on the Judiciary. Actually, the term is a misnomer in that the commission does not participate in the qualifying of judges but only in their disqualification. The commissions usually bring a broader base of participation, with appointments from the bar and even from the lay public being customary. The Judicial Qualifications Commissions normally permit complaints to be filed by individuals, and the primary function of the commissions is to investigate such complaints, make evaluations thereof, and if the complaint is sufficiently serious, to cause a formal hearing to be held thereon. If the commission has recommended dis-

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[15] N.Y. CONST. art. 6, § 22.

[16] CALIF. COST. art. 6, §§ 1b, 10b, (*repealed* Nov. 8, 1966. But see CALIF. CONST. art. 6 §§ 8, 18, *adopted* Nov. 8, 1966). *See* Frankel, *Removal of Judges—Federal and State*, 58 J. AM. JUD. SOC'Y 177 (1965).

ciplinary action or removal, the matter then goes to the State Supreme Court for final decision. One of the key provisions normally found in these laws is that one providing that, prior to the Supreme Court hearings of the matter, the proceedings are to be confidential.

Following the experience of California and their success with the California Qualifications Commission, a number of other states have followed suit, with the result that at the present time twenty-seven states now have some form of a special disciplinary procedure, carried out through either a Judicial Qualifications Commission or a Court on the Judiciary.

An analysis of the provisions of the various states that have one or the other reveals that the normal bases for disciplinary action include willful neglect of duty, persistent and willful failure to perform the duties of the court, intemperate use of acohol or drugs, conviction of a felony or a crime involving moral turpitude, persistent violation of judicial ethics, and gross impartiality on the court.

Most of the states have provisions, particularly under the system of the Judicial Qualifications Commission, whereby there is the opportunity for the exercise of an option as to the penalty to be imposed. This is in most cases either retirement, suspension, censure, or removal.

Whereas, as has been pointed out, most of the Courts on the Judiciary are made up of the Supreme Court, membership on the Judicial Qualifications Commissions varies widely from state to state. They follow a general pattern of having a majority of their membership made up of judges representing various levels of the judiciary within the state, with remaining members coming from the bar and the lay public. Utah has the unusual provision of having its Judicial Qualifications Commission made up of two members of the House Judiciary Committee, two members of the Senate Judiciary Committee and three lawyers.[17] *Chart I at the end of this article provides a brief comparative analysis of the provisions of the various states having either a Court on the Judiciary or a Judicial Qualifications Commission.*

Experience in California and other states which have established either the court or the commission form of judicial discipline has demonstrated certain factors as being vital to the success of the procedure. First of all, the agency responsible for judicial discipline must be within the framework of the judicial establishment itself. It is not essential that all of the members be judges, but a majority should be. This is the only way that the concept of the independence of the judiciary can be maintained.

Secondly, there should be continuity on the court or the commis-

[17] UTAH CODE ANN., § 49-7-8 (Supp. 1969).

sion. This is essential from the standpoint of procedural consistency as well as from the necessity of maintaining consistent standards. A third requirement is that the agency must be accessible and receptive with respect to the opportunity for complaints to be presented. This means, of course, that there must also be a concurrent confidentiality in the receipt and processing of information relating to charges, many of which obviously prove to be frivolous. But confidentiality is important, too, in that in many cases the complainant as well as the judge will need to be protected. The California system provides that all hearings and inquiries will be confidential unless and until the case reaches the Supreme Court for review.

A fourth observation about the system is that it has been demonstrated that the administrative work of the court or the commission should be carried on by a full time executive who has the knowledge, the judgment and the tact to handle the many complicated and sensitive relationships in a manner that will expedite rather than impede the work of the courts. Good staff work is absolutely essential to a proper functioning of any disciplinary agency, however it may be styled or constituted.

Judge A. Frank Bray, Presiding Justice of the District Court of Appeals of the State of California, has pointed out that in a number of instances complaints disclosed situations which, even though they were not serious enough to cause discipline to be invoked against a judge, still have served to indicate to the judge that his relationship on the bench between himself and counsel or witnesses or parties to suits, may be lacking in the common courtesy that citizens have a right to expect from their judicial officials. They may also indicate a lack of knowledge on the part of the judge of the Canons of Judicial Ethics.[18] The very existence of the commission has served to deter some judges from practices which might subject them to disciplinary action and has encouraged others on their own to correct their inadequacies and run their courts in a more satisfactory and efficient manner. The California commission has been known to suggest tactfully that if the improper practice complained of exists, it be discontinued, and thus the commission has been able to correct problems before they grew into disciplinary cases. All of this has seemingly made for a more salutary atmosphere for the judges in California and for the citizens whom they serve.

No plea is entered here that such a system of judicial discipline is a cure-all that will eliminate in one stroke all the problems of judicial imperfection. But it can be said with assurance that those states which

[18] Burke, *The California Story*, 48 J. AM. JUD. SOC'Y 167, 170-71 (1965). It was pointed out that as a result of the Commission's existence in the first four years twenty-six judges were caused to resign or retire.

have instituted the procedures described above universally report great improvement in the efficiency with which their courts function.

Mention has not been made here of the role of the Courts on the Judiciary and the Judicial Qualifications Commissions in handling cases of judicial infirmity and disability. This, of course, is a very important area of consideration but is separate and apart from the matter of discipline. One thing that should be said at this point, however, is that an adequate retirement program ought to be a part of any such plan. It is one of the travesties of our system that in many states we have compelled judges to stay on the courts long after they should have retired simply because there was no satisfactory economic alternative.

The judiciary of the State of Mississippi has fortunately not been the subject of the kind of highly-publicized and earth-shaking scandals that have tarnished the image of the courts of some of our sister states. As a matter of fact, the public and the bar owe an overriding debt of gratitude to the many splendid judges who, at considerable financial sacrifice, have served so ably and so unselfishly on the courts of this state. One of the serious inequities is that they have been for so long so manifestly underpaid.

In view of this track record, plus the further fact that the judges are popularly elected, it can be argued that there is no need in this state to consider any type of a judicial disciplinary proceedings other than those which presently exist. These remedies at the present time consist of impeachment "for treason, bribery, or any high crime or misdemeanor in office," under the provisions of §§ 50-51 of the Mississippi Constitution;[19] conviction and removal from office "for willful neglect of duty or misdeamnor in office," under the provisions of § 175 of the Constitution;[20] and recall in the case of county judges and justices of the peace.[21] The only other constitutional provision directly relating to this subject is § 165,[22] which provides that a judge has a duty to recuse himself when the parties to any cause shall be connected with him by affinity or consanguinity, or where he may be interested in the same. This requirement, however, may be waived by the judge and the parties.

In any event, it would appear that like many other states, Mississippi has only the ponderous and laborious machinery of impeachment or indictment and conviction to serve as remedies for judicial impropriety and misconduct, even though, as has been pointed out, there have

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[19] MISS. CONST. art. 4, §§ 50, 51.

[20] *Id.* art. 6, § 175. Section 4053 of the Mississippi Code adds some additional provisions to the constitutional language. MISS. CODE ANN. § 4053 (1956).

[21] MISS. CODE ANN. §§ 4054-01, -02 (1956).

[22] MISS. CONST. art. 6, § 165. Section 1651 of the Mississippi Code restates the constitutional provision. MISS. CODE ANN. § 1651 (1956).

been no sensational examples of judicial wrong-doing. The present legal provisions are not geared, however, to handle or to take cognizance of the more common situations where judges may be oblivious to some of the standards of the Judicial Canons. Most lawyers can think of situations involving judicial practices that, to say the least, have lent no dignity to the system of jurisprudence in our state, and at times have constituted a gross lack of sensitivity to the Canons of Judicial Ethics. Of course, the Supreme Court is always available to correct these problems insofar as the result in a particular case is concerned, if the record in the case clearly reflects them. Most instances of impropriety in terms of personal conduct, however, are outside the record. Other complaints have stemmed from judicial activities outside the courtroom, where judges have been engaged in business and political activities which have made it difficult for them to serve in a completely unbiased and impartial manner. This is not to say that there have been examples of corruption. It is to say that there have been examples of unwise and indiscreet activities.

The reported Mississippi court decisions have understandably given a good deal of latitude to judges in permitting them to decide for themselves whether there is a conflict of interest in a given case or not.[23] This necessarily is a problem that can be handled only with great awkwardness in a specific case, and is too great a burden to put on the appellate courts, who are bound by the record before them.

If there were a Judicial Qualifications Commission or a Court on the Judiciary, it would be an entirely different matter to lay out rules of procedures that would apply without regard to a specific case. It would appear, therefore, that the work of the State's presently constituted Judiciary Commission may well be directed toward the recommending of the establishment of some such disciplinary procedure. Suffice it to say at this point, while Mississippi has been blessed for the most part with able, courageous and incorruptible judges, it still seems to be in the public interest that there should be an agency that would have the practical and available machinery to eliminate all hints of impropriety and make certain that the highest, most efficient degree of judicial procedure be maintained in all courts and at all times. This would be a step that would help move Mississippi forward as far as the prestige and effectiveness of her court system are concerned.

From the experience of the various states that have tried the two

[23] The rule in Mississippi was set forth at some length in the case of Cashin v. Murphy, 138 Miss. 853, 103 So. 787 (1925). Quoting from 15 Ruling Case Law, p. 530, § 18 the court said, "At the common law, as now administered in England and in the United States, bias or favor [by judges], not the result of interest or relationship, is not supposed to exist." *Id.* at 864, 103 So. at 790. *See also* McLendon v. State, 187 Miss. 247, 191 So. 821 (1939); Garrett v. State, 187 Miss. 441, 193 So. 452 (1940).

systems, it would seem that a Judicial Qualifications Commission is the proper vehicle for Mississippi to adopt. Such a commission could be created by statute and vested with the authority to receive complaints and initiate investigations into alleged judicial inadequacy or impropriety. For it to have the authority of suspension or removal, however, would undoubtedly require an amendment to the Mississippi Constitution. Support for such a process ought to become a priority matter for the bench and bar of our state.

When all is said and done, however, improved methods for the discipline of judges will not alone attain the goal sought to be achieved. It is up to the members of the bar to help create the kind of respect that the courts must have if they are to carry out their purpose.[24] Every lawyer must be careful to discipline himself in his criticism of the law and of the courts. He must always remember that thoughtless, intemperate and unjustified indictment of the courts is frequently misinterpreted by the public, with a resultant diminution of respect for the machinery of our system of jurisprudence. Every lawyer must ask himself whether his attitude toward the courts is calculated to uphold the rule of law, which depends for its strength in the final analysis on the dignity and respect in which the courts are held. This is a responsibility that can only be borne by the bar.

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[24] "But every lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure, and will refrain from unjustified attack on the character of the judges, while recognizing the duty to denounce and expose a corrupt or dishonest judge." Kentucky State Bar Ass'n v. Lewis, 282 S.W.2d 321, 326 (Ky. 1955).

CHART I[25]

STATE	TYPE REVIEW AGENCY	MEMBERS	BASIS FOR DISCIPLINARY ACTION	WHO MAY BRING CHARGES	PROCEDURE	PENALTY
Alabama	Court on the Judiciary	Supreme Court	Neglect of duty, corruption, intemperance, moral turpitude	Attorney General, State Solicitor, or 5 taxpayers	Complaint to and trial by the court	Removal
Alaska	Judicial Qualifications Commission	1 Supreme Court judge 2 Superior Court judges 2 District Court judges 2 lawyers 2 non-lawyers	Willful misconduct, failure to perform duties, drunkenness or disreputable conduct	Not stated	Under rules adopted by commission	Retirement, censure or removal
California	Judicial Qualifications Commission	2 Court of Appeals judges 2 Superior Court judges 1 Muncipial Court judge 2 lawyers 2 non-lawyers	Willful misconduct, failure to perform duties, drunkenness or disreputable conduct	Any citizen	Verified complaint, or commission on its own motion	Retirement, censure or removal

[25] The information contained in this chart represents a summary of the material embraced in Report No. 5 on Judicial Discipline and Removal by the American Judicature Society dated August, 1969. The basic research in the preparation of that report was done by William Braithwaite, research attorney for the American Bar Foundation.

STATE	TYPE REVIEW AGENCY	MEMBERS	BASIS FOR DISCIPLINARY ACTION	WHO MAY BRING CHARGES	PROCEDURE	PENALTY
Colorado	Judicial Qualifications Commission	3 District Court judges 2 County Court judges 2 lawyers 2 non-lawyers	Willful misconduct, failure to perform duties	Any citizen	Verified complaint, or commission on its own motion	Retirement or removal
Delaware	Court on the Judiciary	Supreme Court, Chancellor, Presiding Judge of Superior Court	Willful misconduct, failure to perform duties, mortal turpitude, persistent violation of judicial ethics	Not stated	Trial before the court	Retirement, censure or removal
Florida	Judicial Qualifications Commission	2 Dist. Ct. of Appeals judges 2 Circuit Court judges 2 lawyers 3 non-lawyers	Failure to perform duties, intemperance, or conduct unbecoming a judge	Any citizen	Verified complaint, or commission on its own motion	Private reprimand, removal, or retirement
Hawaii	Court on the Judiciary	Supreme Court	Necessary for the public good	Not stated	Not stated	Removal
Idaho	Judicial Qualifications Commission	Chief Justice 1 District Court judge 2 lawyers 3 non-lawyers	Willful misconduct, failure to perform duties, habitual intemperance	Any citizen	Verified complaint, or commission on its own motion	Retirement, censure or removal

STATE	TYPE REVIEW AGENCY	MEMBERS	BASIS FOR DISCIPLINARY ACTION	WHO MAY BRING CHARGES	PROCEDURE	PENALTY
Illinois	Judicial Qualifications Commission	1 Supreme Court judge 2 Appellate Court judges 2 Circuit Court judges	For cause	Any citizen	Written complaint, or commission through its secretary	Retirement, suspension, or removal
Indiana	Court on the Judiciary	Supreme Court	Conviction of corruption or other high crime	Attorney General	Information filed before Supreme Court	Removal
Iowa	Court on the Judiciary	1 Supreme Court judge 2 District Court judges	Becomes unqualified	Chief Justice, Attorney General, or 25 lawyers	Petition for removal to Supreme Court	Retirement or removal
Louisiana	Judicial Qualifications Commission	1 Court of Appeals judge 3 judges of Courts of Record 2 lawyers 1 non-lawyer	Willful misconduct, failure to perform duties, intemperance, conviction of felony	Any citizen	Verified Complaint, or commission on its own motion	Retirement, censure or removal
Maryland	Judicial Qualifications Commission	3 judges 1 lawyer 1 non-lawyer	Misconduct, failure to perform duties	Any citizen	Verified complaint, or commission on its own motion	Retirement or removal
Michigan	Judicial Qualifications Commission	5 judges 2 lawyers 2 non-lawyers	Misconduct, failure to perform duties, intemperance, conviction of felony	Any citizen	Verified complaint, or commission on its own motion	Retirement, censure or removal

STATE	TYPE REVIEW AGENCY	MEMBERS	BASIS FOR DISCIPLINARY ACTION	WHO MAY BRING CHARGES	PROCEDURE	PENALTY
Nebraska	Judicial Qualifications Commission	2 Supreme Court judges 5 other specified judges 2 lawyers 2 non-lawyers	Willful misconduct, failure to perform duties, intemperance, conviction of crime, disbarment	Any citizen	Petition to commission	Retirement or removal
New Jersey	Court on the Judiciary	(Constitution authorized procedure, but legislature has never implemented it.)				
New Mexico	Judicial Qualifications Commission	2 judges 2 lawyers 5 non-lawyers	Willful misconduct, failure to perform duties, intemperance	Any citizen	Complaint to commission	Retirement, discipline, or removal
New York	Court on the Judiciary	6 judges from specified courts	For cause	Chief Justice, Governor, Presiding Judge of Appellate Courts, Exec. Committee of New York State Bar	Petition by any party entitled to bring charges	Retirement or removal
North Carolina	Court on the Judiciary	Superior Court	Willful misconduct, failure to perform duties, corruption, extortion, conviction of felony, intoxication	5 qualified electors, County Attorney	Petition with clerk of court	Removal

STATE	TYPE REVIEW AGENCY	MEMBERS	BASIS FOR DISCIPLINARY ACTION	WHO MAY BRING CHARGES	PROCEDURE	PENALTY
Ohio	Judicial Qualifications Commission	17 lawyers appointed by Supreme Court	Moral turpitude, violation of judicial ethics, disbarment	Any citizen	Sworn complaint by member of bar	Retirement, suspension, or removal
Oklahoma	Court on the Judiciary	Trial Division: 8 trial judges 1 lawyer Appellate Division: 2 Supreme Court judges 5 District Court judges 1 lawyer	Gross neglect of duty, corruption, drunkenness, moral turpitude, gross impartiality, oppression	Supreme Court, Governor, Attorney General, Exec. Committee of bar, House of Representatives	Petition to Trial Division Appeal may go to Appellate Division	Retirement or removal
Oregon	Judicial Qualifications Commission	3 judges 3 lawyers 3 non-lawyers	Conviction of felony, willful misconduct, failure to perform duties, drunkenness, use of drugs	Any citizen or Supreme Court	Verified complaint or commission on its own motion	Removal
Pennsylvania	Judicial Qualifications Commission	5 judges 2 lawyers 2 non-lawyers	Misconduct in office, failure to perform duties	Any citizen	Complaint to commission	Retirement, discipline, suspension, or removal
Texas	Judicial Qualifications Commission	4 judges 2 lawyers 3 non-lawyers	Willful misconduct in office	Any citizen	Verified complaint or commission on its own motion	Retirement or removal

STATE	TYPE REVIEW AGENCY	MEMBERS	BASIS FOR DISCIPLINARY ACTION	WHO MAY BRING CHARGES	PROCEDURE	PENALTY
Utah	Judicial Qualifications Commission	2 members of House Judiciary Committee 2 members of Senate Judiciary Committee 3 lawyers	Willful misconduct, conviction of felony, failure to perform duties, habitual use of alcohol or drugs	Any citizen	Petition to commission	Retirement, censure or removal
Vermont	Judicial Qualifications Commission	Supreme Court	Misfeasance or malfeasance in office	Any citizen	Written complaint to Supreme Court	Discipline or suspension
Virginia	Court on the Judiciary	Supreme Court	Only for mental or physical disability	Supreme Court	Hearing by the court	Retirement

MISSISSIPPI JUDICIARY COMMISSION— A SYNOPSIS

*Mary Libby Payne**

For years sporadic efforts have been exerted toward improvement in the administration of justice. However, requests for new districts or judgeships have been based on specific needs of a given area without real consideration for the overall picture on a statewide basis. In 1968 the Mississippi legislature created a temporary study group—the Mississippi Judiciary Commission—to make a comprehensive study of the judicial system and to report its findings and recommendations to the 1970 session of the legislature.

Toward that end the commission has conducted an 82-county statistical survey of docket and minute books in circuit, chancery, county, and youth courts in the state with 55,284 filings and 68,473 dispositions tallied in 1968. The commission has cooperated with the Mississippi Governor's Highway Safety Program personnel who are conducting a two-year (1967-68) case-load study of justice of the peace and municipal courts in the state. (To date, 69 counties have been completed with 1,068,527 cases counted.)

To reveal the actual workings and problems of the courts, its personnel and facilities, the commission held six public hearings, participated in six conferences and held 21 meetings. Reports from court administrators from many states, and from similar research groups in other states, were studied, analyzed and compared with the facts revealed by our surveys and hearings.

A total of 52 specific recommendations were made as shown in the chart that follows this article. Matters which deal with specialized areas of practice such as justices of the peace, youth court, defense for the indigent, district attorneys, redistricting of critical areas, court reporters, training seminars for personnel, code revision and other areas of study will not be discussed herein, but were included in the commission's full report to the legislature.

Major emphasis here will be given to recommendations dealing with the administration of justice in general.

Little information heretofore has been available on the nature and quality of the administrative and business practices of Mississippi courts.

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The commission, in its statistical surveys of the supreme court and the circuit, chancery and county courts in the 82 counties, has compiled considerable data on these and related subjects and, on the basis of this information, has found that *Mississippi courts do not operate their nonjudicial, administrative business efficiently.* As population has increased, so has the length of dockets, and so have demands on the judges' time. Our court operations have grown into large enterprises without the benefit of corresponding modernization of business techniques.

Throughout the state, from district to district in the same type of trial court, there is considerable disparity in the sizes of dockets, in the types of cases, in the time from filing to trial to decision, and in other factors pertinent to processing and disposition of case loads. The administrative and record keeping systems in the chancery and circuit clerks' offices are maintained without uniformity. The complete decentralization of trial courts in each district makes difficult any coherent, continuing understanding of the varying docket and case load problems in each court, and makes impossible a comprehensive over-view of these problems on a statewide basis. Since there has been no knowledge of which trial courts are overloaded and which are underloaded with cases, there cannot be efficient use of the judicial personnel of the state in trying and deciding cases.

In the supreme court, filings and case loads have multiplied rapidly, particularly within the past five years. The commission has found that the chief justice of the supreme court uses between $33\frac{1}{3}$ and 50 percent of his time on administrative matters, either directly or indirectly connected with the business of the courts, and that the presiding justice spends between 25 and $33\frac{1}{3}$ percent of his time on similar matters. Many of these administrative, nonjudicial activities could be handled effectively by an administrator, permitting the chief justice and the presiding justice to devote most of their time to their nondelegable judicial duty, the decision of lawsuits.

There currently exists no official organ for formulating recommendations for the improvement of the court system. Furthermore, budget estimates and requests for state appropriations for the judiciary, with the exception of the supreme court budget, are compiled almost solely with reference to salaries, to the exclusion of other relevant considerations. All facts concerning operation of the state courts should be made available to a state agency charged with the responsibility of reporting annually to the courts and the legislature. Under such a practice, the legislature and the courts would have the facts with which to relieve congested dockets, to provide additional funds and facilities where needed, to redistrict where appropriate, and generally to improve the administration of justice.

The commission believes that many inadequacies of the present system could be remedied by creation of an Office of Administrator of the Courts, under the supervision and control of the supreme court. Thirty-three states thus far, including Arkansas, Louisiana, Tennessee, and Florida, have authorized such officers, sometimes called executive secretaries, with gratifying results. The recommendation, based upon examples from other states, would provide Mississippi with a court administrator with limited powers, working at the direction of the supreme court, and assisting in the administration of the non-judicial business of the supreme court and, where appropriate, of the trial courts. The administrator would be appointed by and serve at the pleasure of the supreme court and would have the same qualifications and salary of circuit and chancery judges.

One very salient duty assigned the administrator under the proposed act is to investigate the state of the dockets in the various trial courts and on the basis of this information, with the consent of the supreme court, to make temporary assignments of trial judges to relieve congestion. As already mentioned, studies by the commission of case loads of the circuit, chancery, and county courts in the state's 82 counties reflect great disparity among many of the trial courts in the status of their dockets and in the work load imposed upon the trial judges. One approach to this problem would be the creation of new judicial districts in certain areas, or the addition of judgeships in existing districts. However, the commission has concluded that considerable study will be required in order to satisfactorily redistrict the existing circuit and chancery courts of the state in a way which will suffice for the next decade or so.

In the meantime, to alleviate the problem without the creation of new judgeships or new judicial districts, and further to obtain the most efficient use of all judicial personnel of the state, the commission recommends that the court administrator act authorize the administrative director, with the consent of the supreme court, to designate and assign temporarily any acting circuit judge, county court judge, or chancellor, or any qualified, retired circuit, county, or chancery judge, to preside over any circuit, county, or chancery court of the state upon presentation of a certificate of necessity by the judge of the court where the need arises, or upon motion by the supreme court.

Many counties have only one courtroom in the courthouse. Therefore, in order to utilize another judge temporarily assigned to his court, the resident judge may have to extend the term of court in a particular county. The case of *Murphy v. State*[1] held void a judgment rendered in an extension of a court term which overlapped into a term of an-

[1] 253 Miss. 644, 178 So. 2d 692 (1965).

other county in the same district. Therefore, the commission recommends that the legislature allow extensions of term even if they overlap with other terms in the district so that both judges may sit simultaneously. A draft of the bill will be presented to the legislatiure.

In order to alleviate the necessity of an intermediate appellate court, in the same manner the administrative director could assign temporarily any acting circuit or chancery court judge or any qualified retired supreme, circuit or chancery court judge to sit as a commissioner on the supreme court without a vote but able to handle a full load of assignments for the week or weeks served.

The commission believes that these procedures, consistent with practices developed by experience in many other states, would greatly enhance the disposition of the case loads in many of the overloaded judicial districts of the state, would result in economy for the taxpayer, and would advance the administration of justice in Mississippi.

The problem is stated graphically in a poem used in 1916 by the Colorado court:

> One day through the primeval wood a calf walked home, as good calves should;
> But left a trail all bent askew, a crooked trail, as all calves do.
> Since then, three hundred years have fled, and, I infer, the calf is dead.
> But still he left behind this trail, and thereby hangs my moral tale.
> The trail was taken up next day by a lone dog that passed that way;
> And then a wise bell-wether sheep pursued the trail o'er vale and steep,
> And drew the flock behind him, too, as good bell-wethers always do.
> So from that day, o'er hill and glade, through those old woods a path was made,
> And many men wound in and out, and bent and turned and dodged about,
> And uttered words of righteous wrath, because 'twas such a crooked path;
> But still they followed—do not laugh—the first migrations of that calf,
> And through this winding woodway stalked because he wabbled when he walked.
> This forest path became a lane, that bent and turned and turned again;
> This crooked lane became a road, where many a poor horse, with his load,
> Toiled on, beneath the burning sun, and traveled some three miles in one.
> And thus a century and a half they trod the footsteps of that calf.

The years passed on with swiftness fleet, the road became a
a village street,
And this, before men were aware, a city's crowded thoroughfare.
And soon the central street was this of a renowned metropolis.
And men two centuries and half trod the footsteps of that calf.
Each day a hundred thousand rout followed the zigzag calf
about;
And o'er his crooked journey went the traffic of a continent.
A hundred thousand men were led by one calf near three cen-
turies dead.
They followed still his crooked way, and lost one hundred
years a day;
For thus such reverence is lent to well-established precedent.
A moral lesson this might teach, were I ordained and called
to preach.
For men are prone to go it blind along the calf-paths of the
mind,
And toil away from sun to sun to do what other men have done.
They follow in the beaten track, and out and in, and forth
and back,
And still their devious course pursue to keep the path that
others do.
But how the wise old wood-gods laugh, who saw that first
primeval calf!
Ah! many things this tale might teach; but I am not ordained
to preach.[2]

Chief Justice Edward E. Pringle of the Colorado Supreme Court in an address delivered before a Citizens' Advisory Conference on the Arkansas Judicial System in 1965, in speaking of opposition to a judicial administrator's office, said:

> Let me say to you, that in my opinion, those who object to leaving the calf-path of irresponsibility in judicial administration and who deem the placing of administrative responsibility for the operation of the courts in the highest judicial tribunal in the state as an invasion of the independence of the judiciary, are gravely mistaken, for the course which they would pursue must inevitably lead to the destruction of the independent judiciary. Administrative controls, the authority to devise internal operating procedures for the more efficient operation of the system, statistical controls, moving of judges to meet temporary docket strains, etc.,—these in no way interfere with the inherent authority and the traditional independence of the judge in his decision making functions, and they must never be permitted to do so. But, I say to you, in all sincerity, that unless there is established within the judiciary itself a central administrative control which accepts the responsibility for dignified, efficient and economical management of the Judicial System and which does not concern itself with outworn concepts of personal and official perogative, the Legislative Branch of

[2] Van Kleeck v. Ramer, 62 Colo. 4, 156 P. 1108, 1121 (1916).

> the government will, in response to the demands of the people, take over that function and then the independence of the Judiciary which we so highly prize in this country of ours will indeed be lost.

Elsewhere in this publication[3] is an article which vividly describes the need for a Commission on Judicial Qualifications. Mississippi has been exceptionally fortunate in attracting men of high integrity and sound ability to judicial office, despite generally inadequate compensation and retirement. Other states, less fortunate, have been shocked by judicial scandal. Mississippi has been spared such an indignity. Nonetheless, the Judiciary Commission believes that with the volume and importance of litigation in our courts ever increasing, Mississippi should be equipped with a convenient and equitable procedure for supervising the conduct and competency of the judiciary. Commissions on Judicial Qualifications have received enthusiastic approval in the states where they are in use. The Judiciary Commission recommends the creation in Mississippi of a Commission on Judicial Qualifications.

The commission also recommends a financial disclosure requirement somewhat similar to those for many state and federal judges. The purpose of these financial disclosure provisions is to protect the public against conflicts of interest and financial activities of judges inconsistent with their judicial duties.

Better compensation for our judges can help retain and obtain the best talent for the courts. An informed bar and electorate can be very effective in choosing the best qualified lawyers for the bench. However, none of these factors can warrant the quality of a judge in the future. Sometimes capable lawyers do not make capable judges, and sometimes less than capable lawyers become judges. Moreover, like everyone else, judges age and become physically and mentally disqualified for the rigorous demands of office. These problems usually cannot be remedied by compensation or selection. The remedy lies in procedures to remove, retire, suspend, or otherwise discipline judges who cannot or will not satisfactorily execute the duties of office.

The act creating the Mississippi Judiciary Commission provided that its existence would terminate at the *sine die* adjournment of the 1970 legislature. The commission believes for many reasons that the legislature should continue the Judiciary Commission as an agency for a continuing study of Mississippi courts, and therefore recommends its continuance with certain suggested amendments in the present act.

The judiciary is the third branch of state government. Its efficient functioning lies at the base of the administration of justice in the state.

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[3] Winter, *Judging the Judges—The Techniques of Judicial Discipline*, 41 Miss. L.J. 1 (1970).

The other two departments, legislative and executive, have facilities for re-examining and improving their functioning, but because it is wholly fragmented, the court system of the state does not have such a body to do that. The Judiciary Commission can serve that purpose. It can assist the legislature and the courts in improving the efficiency and adequacy of the courts by statistical and other studies and recommending improvements. The gathering of current, accurate statistics about the work loads of the various courts of the state would be of great value to the legislature when it considers such matters as redistricting of trial courts, the status of dockets, and the assignment of judges. Judicial statistics also would aid the judges of each of the courts of the state in adapting their work to the needs reflected by the volume of litigation.

Prior to the statistical work of the Judiciary Commission, there was never any statistical survey of the case loads, dockets, etc., of Mississippi courts. The commission found from experience that the development and formulation of questionnaires and fact-sheets involved considerable thought and trial and error revisions. This experience and knowledge would be partly wasted if there is no state body to continue using and improving this basic body of knowledge and experience. Moreover, as most of the states have determined, judicial statistics are necessary in the operation of a modern system of courts. We need to know where we have been, where we are, and where we are going in our court system.

Finally, a judicial system which is efficiently and knowledgeably operated will be more economically sound. In the long run, it will save the taxpayers money in such matters as redistricting, studies concerning creation of new judgeships, and overall costs of operation. Moreover, under the recommendations made in its report, the Judiciary Commission will perform the additional duties of a Commission on Judicial Qualifications. Also, its executive secretary will serve as the court administrator.

Like anything else in life, a judicial system never stands still. Population increases and shifts and people develop different types of issues and problems which must be litigated in the courts. The courts need to take advantage of and use new administrative techniques in their nonjudicial business and efficient methods of practices in the processing of dockets and disposition of cases. If the courts do not improve their functioning in the operation of their nonjudicial business, the effectiveness of a judicial system necessarily declines.

Accordingly, the Judiciary Commission recommends that this commission be continued as a fact-finding and recommending agency of the state for the continuing and independent study of the court system of Mississippi.

The commission has recognized that judicial compensation in Mississippi is totally inadequate. Judges' salaries in Mississippi are:

Chief Justice of the Supreme Court	$20,000.00
Presiding Justice of the Supreme Court	$19,500.00
Associate Justices of the Supreme Court, each	$19,000.00
Chancery Court Judges, each	$16,000.00
Circuit Court Judges, each	$16,000.00
County Court Judges vary from $5,400 to	$17,100.00

According to 1969 figures compiled by the Council of State Governments, Wyoming is the only state in the union that pays its Chief Justice of the Supreme Court less than ours; and Mississippi is tied with Idaho and Utah for next to the bottom salary for its Chief Justice. According to testimony at a public hearing on judicial compensation in which the witness quoted from the 1967 study of the American Judicature Society, Mississippi was fourth from the bottom in trial court judges' salaries but the three states below Mississippi were higher in total compensation when expenses, retirement and insurance benefits in those states were included.

A confidential report from the Board of Trustees of Institutions of Higher Learning revealed that 28 Mississippi college and university department heads received more per month in salary than the Chief Justice of the Supreme Court and an additional 54 received more per month than trial judges. In addition, 16 medical school professors received more than trial judges and with the exception of one, who was making the same salary as the chief justice, they are all paid more than the chief justice. Having no possibility of conflicts of interest as a judge has, they are not prohibited from outside practice nor limited much in investments as a judge is. This is not to imply that any college professor is overpaid, but to show the unreasonableness of the pay scale for those whose duty it is to administer justice in the state.

Although each judge is required to travel from county to county in holding court and hearing "vacation" matters, there is no guarantee that he will receive even 7 cents a mile for his necessary travel.

No allowance is given for room and board while out of town in official service though this has been a recognized reimburseable item for routine state employees. In 1966 the legislature provided for its membership a much needed subsistence allowance of $12.50 per day which has already become obsolete. Meanwhile, judges must foot the bill for being "permitted" to perform their official duties out of town.

Many agencies of state government have been included in group hospitalization and life insurance plans, with the state paying 40 percent of the premium. Judges and district attorneys should be included in these provisions.

Because the state needs to retain and induce the highest caliber of judges, immediate relief must be given in increased salaries and reimbursement of mileage and actual travel expenses in performance of official duties as routine state employees.

Specific recommendations for annual salaries are:

Chief Justice of the Supreme Court	$30,000.00
Presiding Justice of the Supreme Court	$29,000.00
Associate Justices of the Supreme Court, each	$28,500.00
Chancery Court Judges, each	$24,000.00
Circuit Court Judges, each	$24,000.00
County Court Judges, each, a supplement over and above all sums paid for the year 1969 of	$ 3,000.00

All judges in the state are eligible for inclusion in the Public Employees' Retirement System. Nonelective employees must retire at age 65. There is no mandatory retirement for an elected official but he is eligible for retirement at age 65 if he wants to try to live on that income. The formula for figuring retirement benefits is: ——(number of years of service) x 1.5% x average compensation for the 5 highest years. By and large, this is a very good system for those who began to work with the state at an early age and have worked for the state for many years.

There are two very real problems. One is not peculiar to judges and that is that no contributions can be made toward income in excess of $15,000.00 so that the average compensation cannot exceed that figure in calculating the benefits.

The second problem is peculiar to judges in that before a man can even be eligible to be a judge, he must have a legal education and a minimum of five years experience in the practice of law. However, the fact is that many judges do not go on the bench until they are in their 40's or above, giving them fewer years than the average number for making the retirement benefits adequate. As a result, judges feel forced to stay on the bench past the time when businessmen, educators, and other public employees are able to slow down and enjoy life at a more leisurely pace. There are but two results in this type of arrangement: either the judge goes beyond his physical ability in handling increased work loads, or the progress and efficiency of the court is hampered.

Missisippi has the lowest retirement benefits for judges in the nation as is borne out by statistical comparisons prepared by the American Judicature Society. This is no reflection on the excellent Public Employees' Retirement System as a whole, but as it applies to judges who were usually practicing attorneys—not state employees—prior to going on the bench.

The situation is becoming acute. In fact, 49 percent of the judges (county, family, circuit, chancery and supreme court) are presently 60 years of age and above and there are only 4 or 5 percent of the judges who are under 40 years of age. The survey of judges by age reveals the following facts:

Age Range	Total No.	Supreme	Chancery	Circuit	County & Family
70 or Above	9	1	1	5	2
65 - 69	15	3	4	3	5
60 - 64	13	2	6	2	3
50 - 59	21	3	10	5	3
40 - 49	14	0	2	8	4
39 & Under	4	0	2	1	1
	76	9	25	24	18

There is presently a provision for a department to supplement the retirement to total 50 percent of the income average of the highest 5 years (subject to the $15,000.00 ceiling) if the retirant has 30 years of service with the system and if he is still available for advice and counsel to the department. Few judges could qualify in that time frame. Therefore, the Judiciary Commission recommends keeping the judges within the present retirement system with the supplement allowed to total 50 percent of income if the judge has 20 years total service (including any prior service, if any, to that of becoming a judge) or 75 percent of income if the judge has 25 or more years total service. The commission also recommends that retired judges, if physically and mentally able, be available for temporary assignment to relieve crowded dockets.

The recommendation of mandatory retirement of the judiciary at the end of the term in which the judge's 70th birthday falls should be added as a new constitutional provision.

What shall come of the report of the work of the Mississippi Judiciary Commission? Like some hobby one eagerly undertakes and later ignores or neglects entirely, it could be forgotten. Will it be labeled as of interest to lawyers alone and shelved with other special interest group matters? In regard to the exertion of effort required in accomplishing more efficient administration of justice, Glenn R. Winters, executive director of the American Judicature Society, in speaking to community leaders said:

> Is it worth it? For you, maybe not. Maybe you are one of the considerable number of people who can live a lifetime and never go to court for anything more serious than a traffic violation.

> But when a uniformed officer rings your doorbell and says that the home you live in is not going to be yours any more, or when the telephone rings at night and it is your son calling to say that he is in jail charged with a crime that he knows nothing about, or when the other automobile runs through the stop sign, smashes your car and puts you and your family in the hospital, then suddenly the circuit court in your county, and the judge who presides over it, become more important to you than anything else.

The Mississippi Judiciary Commission urges an interest in and support of its recommendations.

RECOMMENDATIONS OF MISSISSIPPI JUDICIARY COMMISSION

1. For general administration of justice:
   a. Create the office of Administrator of the Courts;
   b. Authorize temporary assignment of judges to serve outside their districts to equalize work loads in trial courts;
   c. Allow judges to extend one county's term to overlap with an- another to use assigned temporary judges;
   d. Authorize assignment of circuit or chancery court judges to serve as Supreme Court Commissioners;
   e. Create a Judicial Qualifications Commission with authority to discipline, suspend, retire, or remove unfit judges;
   f. Continue the Mississippi Judiciary Commission as a statistical gathering and study group;
   g. Revest the rule-making power in the courts with initiation by an advisory committee with notice to the local bar and with veto power in the legislature;
   h. Provide adequate compensation for the judiciary as well as group hospitalization insurance, travel reimbursement and mileage as other state employees;
   i. Provide a realistic retirement for judges with them being available for temporary assignment to help relieve heavy work loads.
2. For improvement of the administration of criminal justice:
   a. Make the office of district attorney full time with a greatly increased salary and with mandatory contribution to office expense by the boards of supervisors in proportion to the weeks of term allotted to that county in the district;
   b. Provide travel expense reimbursement and mileage and a group hospitalization insurance contribution like other state employees for district attorneys and assistants;

c. Provide for a full time assistant to the district attorney for every 150,000 population in his district at a salary sufficient to induce qualified lawyers to become assistants;

d. Limit association and make cooperation by the county attorney mandatory by adding a penalty for violation of § 3916, Mississippi Code of 1942;

e. Amend the Constitution of 1890 to allow the district attorney to proceed in vacation on information and allow the defendant to waive indictment and plead guilty if represented by counsel;

f. Create the office of State Public Defender to handle all appeals of indigents and post-conviction remedies;

g. Provide for the annual appointment by circuit judges of a panel of lawyers in their districts to handle indigent criminal defense within their districts with adequate hourly pay to represent indigents in all felonies, in misdemeanors where imprisonment might result, and in all youth cases.

3. For redistricting:

a. Relieve the most critical areas in chancery and circuit courts by the addition of one circuit court judge, redistricting in Chancery Court Districts 3, 14, 10, 4 and 15, and the addition of one chancery court judge;

b. Require the Mississippi Judiciary Commission to gather statistics for additional years so that projections can be made on which to base a long-range plan for statewide districting.

4. For personnel:

a. Provide a raise for court reporters in circuit, chancery, and county courts; provide mileage the same as that received by state employees but paid by the county without discretion;

b. Assign court reporters temporarily to go with judges who are on temporary assignment;

c. Require circuit and chancery clerks to attend a clerks' seminar on keeping dockets and minute books, preparing records on appeal, and performing other functions attendant to the office;

d. Provide a sentencing seminar for circuit and county court judges and an increase in probation staff.

5. For improvement of youth court:

a. Place youth court as a division of chancery court;

b. Authorize the chancellor to appoint the county court judge as special chancellor in youth court cases where there is no conflict between custody and youth court determinations;

c. Amend the Youth Court Act to grant concurrent jurisdiction in

areas where youth court jurisdiction was excluded by the 1966 amendments;

d. Amend the Youth Court Act to lower the age limit from 18 to 16;

e. Include school teachers in the battered child requirements and presumptions;

f. Expand training school facilities;

g. Encourage community cooperation for detention centers;

h. Create a permanent state diagnostic center for youths;

i. Establish a separate Probation and Parole Board for juvenile offenders;

j. Require one trained counselor for each youth court judge with additional counselors as needed.

6. For upgrading justice of the peace court:

a. Amend § 171 of the Constitution of 1890 as to justices of the peace to delete the requirements of one per supervisor's district, a two-year residency within the district prior to seeking office, the jurisdictional amount, and any reference to constables;

b. Provide one justice of the peace per 15,000 population, with no more than five nor less than two, in a county, with no districts having more than one post, and with the board of supervisors designating the boundaries of each justice of the peace district;

c. Set a penalty for failure to use a uniform receipt under § 1841.5, Mississippi Code of 1942;

d. Audit each justice of the peace office annually with copies furnished to the board of supervisors, district attorney, and circuit judge within twelve months after the period audited;

e. Require a high school diploma, or its equivalent, for 1971 with a grandfather clause to apply to all justices of the peace seeking reelection in 1971;

f. Require a junior college degree, or its equivalent, for 1975 with a grandfather clause to apply to all justices of the peace seeking reelection in 1975;

g. Require forty hours of instruction under the supervision and direction of the Attorney General after election and before taking office, as well as twenty-four hours instruction annually during the term;

h. Increase the official bond from $2,000.00 to $5,000.00 with the term beginning in 1972;

i. Take justices of the peace off the fee system and place them on a salary to be paid by the county with all fines, fees and costs to be paid into the county treasury;

j. Require the county to provide adequate facilities for holding court in each justice of the peace district;

k. Amend § 1806, Mississippi Code of 1942, so that the defendant in a civil suit can be sued only in the district of his residence and not in the district where the debt was incurred to eliminate the practice of "shopping" for a judge;

l. Abolish the office of constable as the sheriff's office is to become a career law enforcement office with sufficient salaried deputies to perform the functions of that office;

m. Require court costs in civil suits to be paid in advance, otherwise any judgment in such suit is void (except where a pauper's oath is filed);

n. Establish a special court of eminent domain with the circuit judge and jury in counties not having a county court, rather than with a justice of the peace and jury.

7. For appellate work:

Make appeals to circuit or chancery courts from state administrative agencies final unless a writ of certiorari is granted by the supreme court.

8. For revising the Code:

Perform a comprehensive revision of the Code for adoption by the legislature with a professional contractor to point out discrepancies and a local group to make decisions of reconciling them subject to amendment or deletion by the legislature.

9. For further study:

a. Continue research in regard to selection of the judiciary;

b. Continue research in regard to jury selecting and empanelling since recommendations have been deferred as many counties are in the midst of jury contest suits in federal court;

c. Determine what would be a realistic minimum amount in controversy for appeals to the supreme court;

d. Devise a safe and workable method for having the grand jury sit in vacation.

CONSUMER PROTECTIONS UNDER THE UNIFORM CONSUMER CREDIT CODE

*James L. Robertson**

I. General Introduction

A. *Background and Preliminary Considerations*

The Uniform Consumer Credit Code[1] is a comprehensive statute designed to regulate consumer credit sales, consumer leases, and consumer loans.[2] It has been promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), the same organization which has co-sponsored[3] the widely praised Uniform Commercial Code.[4] The underlying purposes of the new Code are to modernize the law governing consumer credit transactions, to encourage economically sound and competitive business practices, to protect the consumer against abuses by the credit industry, and, as is the case with all "uniform" laws, to make uniform the law among the various jurisdictions.[5]

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[1] The Uniform Consumer Credit Code will be referred to alternatively throughout this article as "the UCCC" and as "the Code." Unless otherwise noted, all references are to the Final Draft which was approved by the NCCUSL on July 30, 1968. The UCCC was endorsed by the American Bar Association on August 7, 1968. *See* 54 A.B.A.J. 1017, 1026 (1968). Since then, the UCCC has been enacted into law in Utah and Oklahoma.

[2] The UCCC generally covers all consumer credit transactions involving $25,000.00 or less. UCCC §§ 2.104(1), 3.104(1). The $25,000.00 limitation, however, does not apply to a sale, loan or lease involving land. Still, the great mass of real estate credit transactions will be exempted from the regulatory provisions of the UCCC. Sections 2.104(2)(b) and 3.105 exempt sales and loans involving an interest in land where the credit service charge or loan finance charge does not exceed 10% per annum.

With regard to the $25,000.00 ceiling just mentioned, as well as other dollar amounts mentioned in the UCCC, an escalation formula is provided in the event of continued inflation. Section 1.106 provides that such dollar amounts in the UCCC increase 10% when there is a 10% jump in the Consumer Price Index, using December, 1967, as the Reference Base Index. In December, 1967, the Index was 118.2. In September, 1969, the Index was 129.3. If the Index should hit 130.1 before Mississippi enacts the UCCC, the $25,000.00 limitation would be increased to $27,500.00. Other dollar limitations that will increase will be appropriately noted throughout this article.
[Editor's Note: After this issue went to press, the Consumer Price Index passed the 130.1 mark. Thus, all dollar amounts throughout the article should be increased by 10%.]

[3] The American Law Institute also participated in the drafting of the Uniform Commercial Code.

[4] Miss. Code Ann. §§ 41A:1-101 *et. seq.* (Spec. UCC Supp. 1967) *as amended.*

[5] UCCC § 1.102(2).

The consumer protection provisions of the UCCC will be our primary concern in this discussion.

The UCCC in its present form consists of seven basic divisions. Article 1 includes general provisions, rules of construction, and definitions. Article 2 contains the law governing consumer credit sales, including home solicitation sales and consumer leases. Article 3 states the law concerning consumer loans. Article 4 gives certain rules governing insurance obtained in connection with a consumer credit sale, a consumer lease, or a consumer loan. Article 5 provides protection for the consumer faced with default proceedings. Article 6 calls for the appointment of a UCCC Administrator and defines the powers of that office. Article 9 contains the effective date and repealer. Articles 7 and 8 are presently being reserved for future provisions concerning consumer credit counseling and wage earner receiverships, respectively.

In all parts of the country, the Uniform Consumer Credit Code is likely to be a controversial law,[6] much more so than has been the case with the Uniform Commercial Code. Lenders have roundly denounced the UCCC, complaining that it imposes unnecessary administrative burdens upon them. Part of the financial community further complains that the UCCC contains unwarranted restrictions upon the freedom of contract theory so prominently found in the Uniform Commercial Code.[7] Many established lenders object to the "freedom of entry" philosophy of the Code which would permit almost anyone who could demonstrate good character and financial responsibility to get into the consumer loan business. Some elements of the finance industry further contend that the consumer protections included in the Code are naively conceived and will, as a practical matter, serve only as a nuisance to both lender and borrower in the consumer credit transaction.

Consumer interests, on the other hand, strongly oppose the Code, alleging that it does not go far enough in protecting the consumer, particularly the low-income and uneducated consumer, from alleged abuses within the consumer credit industry. Specifically, the argument is made that the Administrator is not given enough powers to protect the consumer effectively. Both civil and criminal penalties provided by the UCCC are allegedly inadequate. Objection is also made to the repeal of existing state usury laws and legalizing a loan finance charge in certain instances of as much as 36 percent. Consumers Union has

[6] *See, e.g.*, the comments on the floor of House of Delegates at 1968 ABA convention. 54 A.B.A.J. 1026 (1968).

[7] UCC §§ 1-102(2)(b), 1-102(3), Comment 2 (Official 1962 Text). The UCCC draftsmen frankly confess this alleged sin. *See* UCCC § 1.107, Comment. Nevertheless, the UCCC is clearly a free enterprise statute, most of the provisions of which should warm the hearts of conservative economic theorists.

denounced the UCCC as "the credit industry's new reform law,"[8] the preparation of which was accomplished with the support of "funds supplied mainly by the credit industry."[9]

This widespread criticism of the UCCC by both consumers and creditors has led one commentator to remark that this is proof of the fact "that the Code has struck a realistic balance."[10] Although this may well be the case, it is submitted that the new Code should be given a careful, objective, unemotional study before it is enacted in Mississippi. It is the purpose of this manuscript in some small way to assist in the making of such a study.

B. *Comparison of UCCC with the Federal Consumer Credit Protection Act*

The UCCC originated out of the same general concerns[11] that led to the enactment of the Federal Consumer Credit Protection Act, most of the provisions of which became effective on July 1, 1969.[12] The CCPA contains provisions covering consumer credit cost disclosure,[13] credit advertising regulations,[14] extortionate credit transactions,[15] and restrictions on garnishments.[16] The UCCC covers all of these areas and much more. The primary thrust of the CCPA is found in its disclosure requirements. Except for the limited restrictions on extortionate credit and garnishments, it may be generally said that the CCPA does not significantly affect the substance of a consumer credit transaction. For example, the CCPA makes no attempt to provide maximum interest rate charges. On the other hand, the UCCC does control the substance as well as the procedure of consumer credit transactions. The UCCC does set out licensing requirements for consumer credit lenders and does deal with the problem of rate ceilings.

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[8] 34 CONSUMER REPORTS 122 (1969).

[9] *Id.*

[10] Miskell, Commentary, 24 BUS. LAWYER 221 (1968). *See also* Moo, Commentary, 24 BUS. LAWYER 223, 226 (1968).

[11] The most comprehensive consideration of these "concerns" is B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION (1965). These "concerns" viewed from the standpoint of the poor in Mississippi are ably discussed in Comment, *The Indigent and Consumer Credit*, 39 MISS. L.J. 261 (1968).

[12] Pub. L. No. 90-321, 82 Stat. 146, 15 U.S.C. §§ 1601-1613, 1631-1641, 1661-1665, 1671-1677 and 18 U.S.C. §§ 891-896 (Supp. IV, 1969). This federal enactment is referred to hereafter as the CCPA. Title I of the CCPA, dealing with consumer credit cost disclosure, is popularly known as the Truth-in-Lending Act. 15 U.S.C. §§ 1601 *et seq.* (Supp. IV, 1969).

[13] 15 U.S.C. §§ 1601 *et seq.* (Supp. IV, 1969).

[14] 15 U.S.C. §§ 1661 *et seq.* (Supp. IV, 1969).

[15] 18 U.S.C. §§ 891 *et seq.* (Supp. IV, 1969).

[16] 15 U.S.C. §§ 1671 *et seq.* (Supp. IV, 1969). These provisions do not become effective until July 1, 1970.

The CCPA is law throughout the United States without regard to whether or not the UCCC is enacted by the state legislatures. Since there is much overlap between the two laws, the draftsmen of the CCPA and the UCCC have taken pains to assure the absence of conflict and confusion between the two laws in those states where the UCCC is adopted. In the first place, § 123 of the CCPA[17] provides that, with respect to the disclosure requirements of the federal law, the Federal Reserve Board may exempt from compliance with the federal law the creditors of any state under whose law consumer credit transactions are

> subject to requirements substantially similar to those imposed under this part [relating to the disclosure], and [where] there is adequate provision for enforcement.[18]

It is expected that those states which enact the UCCC, once the adequacy of their enforcement procedures has been demonstrated, will be exempted from compliance with the disclosure requirements of the CCPA.[19] On the other hand, one of the underlying purposes and policies of the UCCC is "to conform the regulation of consumer credit transactions to the policies of the Federal Consumer Credit Protection Act; . . . ."[20] In fact, the UCCC disclosure requirements are substantially similar to the CCPA requirements.[21] Any state which enacts the UCCC for the purpose of getting out from under the federal law is kidding itself.

No doubt recognizing that all lenders made the adjustment to comply with the CCPA beginning July 1, 1969, the UCCC wisely provides that any seller or lender who complies with the disclosure requirements of the federal act shall be deemed to be in compliance with the disclosure requirements of the UCCC.[22]

With regard to disclosure requirements in advertising[23] and the restrictions on garnishments[24] and extortionate credit,[25] however, a lender is faced with compliance with both federal and state law. Because of the similarity between the provisions of the two laws in these areas, this is not likely to create a problem.

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[17] 15 U.S.C. § 1633 (Supp. IV, 1969). This exemption will not apply to the CCPA rules on credit advertising disclosure, garnishments or extortionate credit.

[18] *Id.*

[19] In UCCC, 1969 Revised Final Draft, Prefatory Note, the UCCC draftsmen make clear their belief that this exemption will be forthcoming.

[20] UCCC § 1.102 (1) (f).

[21] *Compare* 15 U.S.C. §§ 1638-39 (Supp. IV, 1969) *and* Federal Reserve Regulation Z § 226.6 *with* UCCC §§ 2.302 and 3.302. *Compare* 15 U.S.C. § 1637 (Supp. IV, 1969) *with* UCCC §§ 2.310, 3.309 and 3.310.

[22] UCCC §§ 2.301 (2) (b), 3.301 (2) (b).

[23] 15 U.S.C. §§ 1661 *et seq.* (Supp. IV, 1969).

[24] 15 U.S.C. §§ 1671 *et seq.* (Supp. IV, 1969).

[25] 18 U.S.C. §§ 891 *et seq.* (Supp. IV, 1969).

C. *Effect of UCCC on Existing State Law*

Another matter which will no doubt be of concern to Mississippians is the effect of the Uniform Consumer Credit Code on existing state laws, and particularly on the recently enacted Uniform Commercial Code.[26] A quick glance at the UCCC will make it clear that much of the terminology and many of the concepts of the Uniform Commercial Code are carried over. As a general proposition, it may be stated that the UCC will remain unchanged except with respect to secured transactions involving consumer goods and farm-related secured transactions. The UCCC in no way attempts to deal with transactions between two businessmen. The UCCC provides that, unless a particular provision of the UCCC states to the contrary, "the Uniform Commercial Code and the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause . . . ,"[27] supplement the provisions of the Uniform Consumer Credit Code.

If the UCCC is adopted in Mississippi, a number of existing state statutes will, in whole or in part, be repealed. First, the Mississippi usury law[28] will be repealed. In addition, the Motor Vehicle Sales Finance Act,[29] the Small Loan Regulatory Act,[30] and the Small Loan Privilege Tax Act[31] would have to be repealed. In addition, there are other lesser Mississippi statutes that will have to be repealed.[32]

II. General Scope of the Uniform Consumer Credit Code

There are three major aspects of the Uniform Consumer Credit Code which will receive surface consideration only in this article.[33]

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[26] Miss. Code Ann. §§ 41A:1-101 *et seq.* (Spec. UCC Supp. 1967). The UCC became effective in Mississippi on March 31, 1968. *Id.* § 10-101.

[27] UCCC § 1.103.

[28] Miss. Code Ann. § 36 (Supp. 1968). If the UCCC is enacted in Mississippi, the repeal of present Mississippi usury limitations will not be limited to consumer-related transactions, UCCC §§ 2.605 and 3.605 make it clear that with respect to any credit transaction other than a consumer credit transaction, the parties may contract for the payment by the debtor of whatever credit service charge or loan finance charge may be agreed upon. In other words, outside of the field of consumer credit transactions, the UCCC adopts a freedom of contract theory with regard to credit service charges and loan finance charges.

[29] Miss. Code Ann. §§ 8075-01 *et seq.* (Supp. 1968).

[30] Miss. Code Ann. §§ 5591-01 *et. seq.* (Supp. 1968).

[31] Miss. Code Ann. §§ 5591-31 *et seq.* (Supp. 1968).

[32] *E.g.*, Miss. Code Ann. §§ 275, 5590 (Supp. 1968).

[33] This article is not intended as a comprehensive discussion of all of the provisions of the Uniform Consumer Credit Code. Here, we are primarily concerned with those features of the UCCC which are designed for the protection of the con-

These are the "freedom of entry" concept,[34] the use of rate ceilings to regulate finance charges,[35] and the sections dealing with the administration of the Act.[36] Each of these aspects of the UCCC has proven controversial and each should be carefully considered by the Mississippi Legislature before enactment of the UCCC. Suffice it to say that we do not find the decisions of the UCCC draftsmen on these issues to be totally convincing.

Some discussion of the overall scheme of the UCCC is necessary as a background for understanding the specific discussion of the consumer protection that follows. To begin with, the UCCC is based on a major policy decision that the cost of credit should be determined in the *market place* and not by state fiat.[37] The UCCC is strictly a free enterprise statute. Primarily through disclosure of the cost of credit, the draftsmen have attempted to arm the consumer so that he may bargain effectively with his potential creditors.[38] If effective bargaining between debtors and creditors in advance of a consumer credit transaction does take place, the draftsmen reason that competition will determine the cost of credit.

One feature of this free enterprise attitude of the UCCC is the

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sumer. As noted elsewhere, the UCCC's freedom of entry theory and rate ceilings have already been thoroughly discussed in other periodicals. *Infra* notes 34 and 35. As these various provisions are discussed hereafter, the author will from time to time make comments and evaluations of the various sections. In so doing, it should be acknowledged at the outset that these comments and evaluations are only to a very limited extent based upon empirical evidence. The lack of hard, cold statistics concerning the consumer credit industry in Mississippi makes this study necessarily a subjective one. It is to be hoped, however, that as the Mississippi Legislature begins to weigh and consider the Uniform Consumer Credit Code that empirical data can be obtained and made available.

[34] UCCC § 3.503. For discussions favoring free entry into the consumer loan business, see Shay, *The Uniform Consumer Credit Code: An Economist's View*, 54 CORNELL L. REV. 491 (1969); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROPOSED "FREEDOM OF ENTRY" AMENDMENTS TO UNIFORM CONSUMER CREDIT CODE—SPONSORS' REPLY (1968). For a critique of freedom of entry which this author finds persuasive, see Harper, *The Uniform Consumer Credit Code and Freedom of Entry*, 24 BUS. LAWYER 227 (1968).

[35] UCCC §§ 2.201, 2.207 (3), 3.201, 3.508. Rate ceilings under the UCCC refer to the total of all finance charges, not just interest. For detailed discussions of the UCCC rate ceilings, see Benfield, *Money, Mortgages, and Migraine—The Usury Headache*, 19 CASE W. RES. L. REV. 819 (1968); Jordan and Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 388-408 (1968); Felsenfeld, *Consumer Interest Rates: A Public Learning Process*, 23 BUS. LAWYER 931 (1968).

[36] UCCC §§ 6.101 *et seq.* The Code calls for the appointment of an Administrator who will have broad enforcement and regulatory powers. *See* Jordan and Warren, *supra* note 35, at 417-32.

[37] UCCC, 1969 Revised Final Draft, Prefatory Note at XIX.

[38] See discussion in Sections III through IX *infra*.

"freedom of entry" concept. Under the new Code, a prospective licensee must only demonstate financial responsibility, character and fitness in order to obtain authority from the administrator to enter the consumer loan field.[39] The requirement that the licensee post a bond has been omitted.[40] After much debate, the draftsmen of the UCCC have determined to "facilitate entry into the cash loan field so that the resultant rate competition fostered by disclosure will generally force rates below the permitted maximum charges."[41] The draftsmen have further announced a secondary purpose of free entry:

> [Reduction of] the likelihood of establishing localized monopolies in the granting of cash credit. Such monopolies tend to push rates charged to the maximum permitted levels and to establish conditions under which some share of the anticipated monopoly profits are devoted to direct or indirect pressures to obtain the license.[42]

As seen from the above official comments, the UCCC draftsmen feel that the freedom of entry concept fits in close harmony with the rate ceilings and the disclosure provisions.

The maximum credit service charges,[43] calculated according to the actuarial method permitted in connection with consumer credit sales and consumer loans, are 36% on the first $300 of the amount financed, 21% on the amount financed which is more than $300 but less than $1,000, and 15% on the amount financed which is over and above $1,000.[44] Or, in the alternative, a credit service charge at a flat rate of 18% per year on the unpaid balances of the amount financed may be charged.[45]

The draftsmen of the UCCC firmly believe that a combination of credit cost disclosure and freedom of entry will keep the rates to be charged significantly below the maximums allowable. Competition, it

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[39] UCCC § 3.503.

[40] Mississippi law now requires that a loan company post a $1,000 bond before being licensed. MISS CODE ANN. § 5591-36 (Supp. 1968). It is submitted that requirement is virtually meaningless. As noted elsewhere in this article, for all practical purposes, Mississippi has a "freedom of entry" situation now.

[41] UCCC § 3.503, Comment 1.

[42] UCCC § 3.503, Comment 2.

[43] Credit service charge, UCCC § 2.109, and the companion term, loan finance charge, UCCC § 3.109, include the sum of all charges imposed directly or indirectly by the seller or lender as an incident to the extension of credit. Rate ceilings in the UCCC refer to the credit service charge or loan finance charge in the same manner as usury laws refer to interest rates. Compare the CCPA definition of the finance charge. 15 U.S.C. § 1605(a) (Supp. IV, 1969).

[44] UCCC §§ 2.201, 3.508. Under the escalation clause discussed in note 2, *supra*, the $300 amount will probably be $330 and the $1,000 figure will probably be $1,100 by the time Mississippi enacts the UCCC.

[45] UCCC §§ 2.201(2)(b), 3.201, 3.508(2)(b).

is argued, will prevent rates from reaching the statutory ceilings. The present author questions whether or not this will be the case. It is submitted that the vast majority of loan companies in this state will keep their rates near the maximums allowable by law, whether the UCCC rate ceilings become law or whether we remain under the present Small Loan Regulatory Act. We question the validity of the UCCC's competition theory as applied to Mississippi. In making such a judgment, however, it should be borne in mind that Mississippi already allows loan companies to charge rates in excess of 36% simple interest on certain small loans.[46] Further, existing Mississippi law allows free entry into the money lending market and provides for much less supervision of lenders than would be provided under the UCCC. Disclosure has also been required in this state for some time, although in a rather inadequate form. In other words, the carefully articulated and sophisticated competition theory of the UCCC quite possibly will work no better in Mississippi than the unarticulated, and perhaps even unintended, competition theory embodied in existing Mississippi law.

III. Disclosure of the Cost of Credit

A. *Federal Truth-in-Lending Disclosure Requirements*

In the eyes of many, disclosure of the cost of credit has been the foremost reform needed in the consumer credit field. Disclosure acts at the state level have been in effect for many years.[47] The Mississippi Small Loan Regulatory Act[48] and the Mississippi Motor Vehicle Sales Finance Act[49] both contain typical disclosure provisions. And, of course, banks have always disclosed the interest rates being charged to the customer. The thing which has concerned many people is that the cost of credit is stated in different terms by different segments of the consumer credit industry. This, it is argued, has heretofore[50] prevented

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[46]The UCCC rate ceilings, if they become law in Mississippi, would result in a *decrease*, not an *increase*, in maximum allowable rates as compared with the maximums allowable under current state law. The Mississippi Small Loan Regulatory Act provides that finance charges and interest when combined shall not exceed 2% per month on loans of $100 or more. Miss. Code Ann. § 5591-09 (b) (Supp. 1968). Under this limitation, a lender could use the "add-on" method and actually collect finance charges at the simple interest rate of *41.75%* per annum! The passage of the UCCC in Mississippi would have the effect of lowering the rate ceilings on these small loans by at least 6.75%.

[47] A summary of existing state disclosure acts is found in B. Curran, *supra* note 11, at 95-100, 293-300.

[48] Miss. Code Ann. §§ 5591-01 *et seq.* (Supp. 1968).

[49]Miss. Code Ann. §§ 8075-01 *et seq.* (Supp. 1968).

[50] A uniform disclosure requirement became law on July 1, 1969. 15 U.S.C. §§ 1601 *et seq.* (Supp. IV, 1969).

the consumer from comparing the cost of credit at different institutions and from shopping for the cheapest credit available.

Disclosure of the cost of credit by all creditors in terms of a single annual percentage rate[51] has been the thrust of the Truth-in-Lending movement led by former Senator Paul H. Douglas over the past ten years.[52] The most prominent feature of the Federal Consumer Credit Protection Act, which is an outgrowth of Senator Douglas' original bill, is the disclosure requirement.[53] The federal act, which became effective July 1, 1969, requires all creditors to add up all charges which are imposed upon the debtor as a requirement for the making of a loan and to disclose the total as the finance charge.[54] Then, the creditor is required to compute the cost of credit to the debtor on an annual basis and disclose that percentage figure as the annual percentage rate.[55] Under federal law, these requirements are imposed upon all who extend consumer credit, be they banks, loan companies, retail sellers, credit card issuers, or whatever. And, although the forms will not be identical, every creditor is now required to give to the customer, prior to the completion of the particular credit transaction, a disclosure statement with a dollar figure beside the magic words "finance charge" and a percentage figure beside the magic words "annual percentage rate." This, it is argued, will enable the customer to more effectively compare the cost of credit at loan companies with the cost of credit at non-profit credit unions and with the cost of credit at banks.[56]

The disclosure requirements of the Federal Act were largely derived from the earlier drafts of the Uniform Consumer Credit Code. The federal law, as passed by the Congress, requires disclosure of:

> all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:
> (1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.
> (2) Service or carrying charge.
> (3) Loan fee, finder's fee, or similar charge.
> (4) Fee for an investigation or credit report.

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[51] The term Annual Percentage Rate is used in the Consumer Credit Protection Act, 15 U.S.C. § 1606 (Supp. IV, 1969), and in the UCCC §§ 2.304 (2), 3.304 (2).

[52] S. 2755, 86th Cong., 2d Sess. (1960).

[53] 15 U.S.C. §§ 1631-41 (Supp. IV, 1969).

[54] 15 U.S.C. § 1605 (Supp. IV, 1969). Comparable UCCC terms are credit service charge and loan finance charge. *Supra* note 43.

[55] *Supra* note 51.

[56] Jordan and Warren, *supra* note 35, at 408-417.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.[57]

B. *Disclosure Under the Uniform Consumer Credit Code*

In considering the Uniform Consumer Credit Code, it must be kept in mind again that the above requirements contained in the federal law are imposed upon creditors in the State of Mississippi now. The decision for the Mississippi Legislature is not whether or not we will have a tough disclosure law in this state. Disclosure is here to stay whether we like it or not. As noted above, the federal act provides that the Federal Reserve Board has the power to exempt from compliance with the federal disclosure rules those creditors in any state the law of which has disclosure requirements substantially similar to the federal requirements, *along with adequate provisions for enforcement.*[58] This exemption provision in the federal law has led some to form the less than rational judgment that adoption of the UCCC would get them out from under the disclosure provisions of the federal law.[59] It is submitted that any state which enacts the UCCC for the sole purpose of obtaining exemption for its creditors from compliance with the federal disclosure law is being extremely naive. The disclosure requirements of the UCCC are just as strong as those of the federal statute, and it has now been made clear that the Federal Reserve Board does not intend to grant exemption to any state which does not have a strong administrator adequately empowered to enforce the disclosure provisions of the UCCC.[60] Therefore, insofar as the disclosure provisions of the UCCC are concerned, there is only one limited decision to be made: shall Mississippi's creditors be policed by a strong federal administrator or by a strong state administrator?

One formal difference between the UCCC and the federal Truth-in-Lending Act is that the UCCC distinguishes between consumer credit sales and consumer loans.[61] The federal act does not.[62] Both acts have

[57] 15 U.S.C. § 1605 (a) (Supp. IV, 1969), read in connection with 15 U.S.C. § 1631 (a) (Supp. IV, 1969).

[58] 15 U.S.C. § 1633 (Supp. IV, 1969).

[59] This view has been encouraged by the NCCUSL which states that the CCPA "presents an unusual opportunity for the early enactment by the States of the Uniform Consumer Credit Code." UCCC, 1969 Revised Final Draft, Prefatory Note at XXII.

[60] Letter from Federal Reserve Board Vice Chairman J. L. Robertson [in no way related to the author of this article] to Alfred A. Buerger, Dec. 26, 1968, in UCCC, 1969 Revised Final Draft, Prefatory Note at XXIX.

[61] Article 2 of the UCCC covers consumer credit sales. Article 3 covers consumer loans. The wisdom of this distinction is highly doubtful. Shay, *supra* note 34, at 509; Jordan and Warren, *supra* note 35, at 387. In fairness, it should be mentioned

set up separate sub-categories of consumer credit sales and loans for credit card plans,[63] revolving loan plans,[64] and revolving charge accounts.[65] Whereas, the federal act provides one term, "Finance Charge,"[66] which must be present on the disclosure statement of every creditor, the UCCC divides this into a loan finance charge[67] in the case of a loan and a credit service charge[68] in the case of a sale. A comparison of § 2.306 [Consumer Credit Sales not Pursuant to Revolving Charge Account] and § 3.306 [Consumer Loans not Pursuant to Revolving Loan Account] quickly reveals that the disclosure requirements are practically identical. It is submitted that the distinction between loans and sales in the UCCC, although questionable on other grounds,[69] in no way detracts from the effectiveness of the disclosures as a means for advising the debtor of the cost of credit. If disclosure is a viable concept, UCCC disclosures will enable the debtor to make an informed judgment concerning where he will seek credit, whether he should seek his credit in the form of a direct loan or an indirect loan, or credit sale.

The UCCC requires that all disclosures shall be made clearly and conspicuously.[70] A disclosure is clear and conspicuous when it is presented to the debtor in such a way that a reasonable person ought to have noticed it.[71] The UCCC further requires that disclosures shall be in writing, a copy of which shall be delivered to the debtor.[72] Disclosures shall be made in the case of consumer credit sales, consumer leases, revolving charge accounts, credit card plans, revolving loan plans, consumer loans and any other type of consumer credit transaction that the mind can imagine. There are no loopholes.

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that the primary purpose for making a distinction between consumer credit sales and consumer loans in the UCCC was to preserve the time price doctrine for consumer credit sales in those states which have usury restrictions embodied in their constitutions. Obviously, such constitutional restrictions might seriously affect the whole operation of the UCCC by keeping credit service charges and loan finance charges below the levels at which they would otherwise be set by competition. The preservation of the time price doctrine in consumer credit sales in those states with such constitutional provisions will permit such states to enact the UCCC and still give the free enterprise theory behind it a fair chance to work.

[62] The CCPA, as interpreted by the Federal Reserve Board, refers merely to "consumer credit." Federal Reserve Regulation Z § 226.2 (k).

[63] UCCC §§ 1.301 (9), (16).

[64] UCCC § 3.108.

[65] UCCC § 2.108. The CCPA refers to all of these plans as open end credit plans. 15 U.S.C. § 1637 (Supp. IV, 1969); Federal Reserve Regulation Z § 226.2 (r).

[66] *Supra* notes 43 and 54.

[67] *Id.*

[68] *Id.*

[69] *Supra* note 61.

[70] UCCC §§ 2.302 (1) (a), 3.302 (1) (a).

[71] UCCC § 1.301 (6).

[72] UCCC §§ 2.302 (1) (b), 3.302 (1) (b).

Specific disclosures required to be made in the case of consumer credit sales and consumer loans are as follows:

(1) In the case of a sale, a brief description of the goods, services, or interest in lands sold.[73]

(2) In the case of a sale, the cash price of the goods, services or interest in land, together with any taxes not included in the cash price. The creditor must then disclose the amount of the down payment and a statement of the portion paid in money and the portion paid by allowance for property traded in. There must follow on the disclosure statement the difference between the cash price and the amount of the down payment.[74] In the case of a loan, the creditor must disclose the net amount paid to the debtor.[75]

(3) In the case of both sales and loans, the amount paid or payable for registration, certificate of title or license fees, if not included in the cash price, or loan amount, together with a description or identification of these fees.[76]

(4) The amount of official fees and taxes if not included in the the cash price, together with a reasonable description and identification of such fees and taxes.[77]

(5) A brief description of insurance to be provided or paid for by the seller, including the type and amount of the coverages, and, if a separate charge is made, the amount of the charge.[78]

(6) Any additional charges which may be made by the creditor as a condition to the extension of the credit, along with a brief description of identification of such charges.[79]

(7) The amount financed in the case of a sale, or the amount of principal in the case of a loan.[80]

(8) A schedule of installment payments, together with a statement of default, delinquency or other similar charges payable in the event of late payments.[81]

(9) A description of any security interest acquired by the creditor in connection with the transaction.[82]

After all of the above information has been set out, two key disclosures must be made:

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[73] UCCC § 2.306 (2) (a).
[74] UCCC §§ 2.306 (2) (b), (c), (d).
[75] UCCC § 3.306 (2) (a).
[76] UCCC §§ 2.306 (2) (e), 3.306 (2) (b).
[77] UCCC §§ 2.306 (2) (f), 3.306 (2) (c).
[78] UCCC §§ 2.306 (2) (g), 3.306 (2) (d).
[79] UCCC §§ 2.306 (2) (h), 3.306 (2) (e).
[80] UCCC §§ 2.306 (2) (i), 3.306 (2) (f).
[81] UCCC §§ 2.306 (2) (l), (m), 3.306 (2) (i), (j).
[82] UCCC §§ 2.306 (2) (n), 3.306 (2) (k).

(1) The credit service charge[83] or loan finance charge;[84] and,

(2) The annual percentage rate.[85]

Obviously, credit card plans, revolving loan accounts and revolving charge accounts could not fit neatly into the categories set up for ordinary loan and credit sale disclosures. Computation of accurate rates is next to impossible when the credit card holder makes periodic purchases in varying amounts, and reduces his balance by varying payments each month. In the case of these continuing arrangements, the disclosures must be made at two times. First, the disclosure must be made to the consumer at the time of the issuance of the credit card[86] or at the time of the opening of the revolving charge account[87] or revolving loan account.[88] Second, certain disclosures must be made on each periodic statement sent by the creditor to the consumer.[89]

The initial disclosures required to be made under a revolving charge account, revolving loan account, or credit card plan are the following:

(1) The conditions under which a credit service charge or loan finance charge may be made, including the time period, if any, within which the debtor may pay the outstanding balance in full without incurring any credit charge or loan finance charge.[90]

(2) The method of determining the balance upon which the credit service charge or loan finance charge will be computed.[91]

(3) The method of determining the amount of the credit service charge or loan finance charge, including the periodic percentage or percentages used to calculate the charge and the amount of any minimum charge.[92]

(4) The corresponding nominal annual percentage rate.[93]

(5) The conditions under which any additional charges may be made and the method by which they will be determined.[94]

(6) The conditions under which the creditor may retain a security

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[83] UCCC § 2.306 (2) (j).

[84] UCCC § 3.306 (2) (g).

[85] UCCC §§ 2.306 (2) (k), 3.306 (2) (h).

[86] UCCC § 3.310.

[87] UCCC § 2.310 (1) (d). *Compare* 15 U.S.C. § 1637 (a) (Supp. IV, 1969).

[88] UCCC § 3.309 (1) (d). *Compare* 15 U.S.C. § 1637 (a) (Supp. IV, 1969).

[89] UCCC §§ 2.312, 3.311.

[90] UCCC §§ 2.310 (1) (a), 3.309 (1) (a).

[91] UCCC §§ 2.310 (1) (b), 3.309 (1) (b).

[92] UCCC §§ 2.310 (1) (c), 3.309 (1) (c).

[93] UCCC §§ 2.310 (1) (d), 3.309 (1) (d). The corresponding nominal annual percentage rate is the percentage used to calculate the credit service charge or loan finance charge for one billing cycle or period pursuant to a revolving charge or loan plan multiplied by the number of billing cycles or periods in a year. UCCC §§ 2.304 (3), 3.304 (3). *Compare* 15 U.S.C. § 1637 (a) (4) (Supp. IV, 1969).

[94] UCCC §§ 2.310 (1) (f), 3.309 (1) (f).

interest in property of the debtor to secure the debt, together with a description of the security interest which may be retained or acquired.[95]

The following disclosures must be made on the periodic statement transmitted by the creditor to the debtor:

(1) The annual percentage rate and the credit service charge or loan finance charge with respect to each consumer credit transaction to which the statement relates.[96]

(2) The date by which, or the period, if any, within which payment must be made in order to avoid further service charges or loan finance charges.[97]

(3) Other items of disclosures required by rules and regulations of the administrator.[98]

As in the case of the Federal Consumer Credit Protection Act, the UCCC also requires certain disclosures in connection with advertising.[99] The UCCC covers advertisements with respect to consumer credit sales, consumer loans, or consumer leases and covers the posting of a public sign, distribution of a catalogue, printed advertisements in a newspaper or magazine, and spoken advertisements through radio, television or other mass media. The basic thrust of the UCCC advertising provisions is to prohibit false or misleading advertising on the part of sellers and lenders.[100] No such general prohibition is found in federal statute. The federal law, however, contains more specific provisions,[101] and inasmuch as the exemption under the CCPA by the Federal Reserve Board does not extend to advertising, the federal law must be complied with whether Mississippi adopts the UCCC or not. Therefore, we can see no reason why any concern should be created by the prospect of the enactment of the UCCC advertising rules.

C. *Evaluation of Disclosure as a Consumer Protection Device*

Truth in lending is now an idea which has come of age. The action by Congress in passing the CCPA is only the most prominent manifestation of the belief that disclosure is at the heart of consumer credit reform. Except in a few circles,[102] disclosure, unlike other proposed

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[95] UCCC §§ 2.310 (1) (g), 3.309 (1) (g).

[96] UCCC §§ 2.312 (1), 3.311 (1). *Compare* 15 U.S.C. § 1636 (Supp. IV, 1969).

[97] UCCC §§ 2.312 (2), 3.311 (2).

[98] UCCC §§ 2.312 (3), 3.311 (3).

[99] UCCC advertising regulations are found in §§ 2.313 and 3.312. *Compare* 15 U.S.C. §§ 1661 *et seq.* (Supp. IV, 1969) *and* Miss. Code Ann. § 5591-05 (Supp. 1968).

[100] UCCC §§ 2.313 (1), 3.312 (1).

[101] 15 U.S.C. §§ 1662-64 (Supp. IV, 1969).

[102] Kripke, *Consumer Credit Regulation: A Creditor-Oriented View Point*, 68 Colum. L. Rev. 445, 455-69 (1968). Professor Kripke's position correctly stated, is that disclosure was, and is, a necessary reform but not one sufficient to meet any of the real problems existing today in the consumer credit business.

consumer credit reforms, seems almost to enjoy an immunity from criticism. It seems to be assumed that disclosure is an economically sound method of arming the consumer with the ability to bargain effectively with his creditors.

We agree that disclosure requirements are an important part of any comprehensive consumer credit statute. Certainly, the new federal statute represents a step forward, and it is submitted that the UCCC disclosure provisions would be an improvement over the present disclosure requirements under Mississippi law.[103] It is respectfully submitted, however, that disclosure has been overrated and will not prove to be the great boon to the consumer that its proponents claim.

In practice, disclosure will not materially change things from what they were before July 1, 1969. First, for those consumers who are able to obtain bank financing, it is submitted that they have long known that bank rates were lower than rates charged by credit card plans and rates charged on retail installment sales and personal loans through finance companies. The consumer with a good credit rating may not have been fully conversant with "add-on" interest frequently used by banks, but even before disclosure he clearly understood that he could get the best deal at his bank. Second, for those consumers who do not generally deal with banks for their credit, it is submitted that their overriding concern is not the total finance charge or the annual percentage rate. These people, it is submitted, care primarily about the amount of the monthly payments. Many of these lower middle-class consumers would probably prefer to make a purchase with a monthly payment of $25.00 at an annual percentage rate of 36% than a transaction with a monthly payment of $50.00 and an annual percentage rate of 15%.

There is still another fact of life which will reduce the effectiveness of disclosure. The federal law requires that disclosures be made *prior to the completion of the transaction.*[104] In a normal situation, this means that the disclosure statement will be handed to the consumer only minutes, if not seconds, before the transaction is completed. Under these circumstances, shopping around is simply not going to occur. Rare is the debtor, who, upon receiving a disclosure statement while sitting at his banker's desk, will decide to go down the street to another bank to compare the rates. Rare is the buyer, who, having decided that he wants a particular television set or refrigerator, will decide, upon receiving a disclosure statement from the seller, to go to another store and

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[103] Small Loan Regulatory Act, MISS. CODE ANN. § 5591-14(a) (Supp. 1968). Requirements in Motor Vehicle Sales Finance Act are in MISS. CODE ANN. § 8075-13(4) (Supp. 1968).

[104] 15 U.S.C. § 1638(b) (Supp. IV, 1969). *Compare* UCCC §§ 2.302(2)(a), 3.302(2)(a).

compare the annual percentage rate there. This is so because the disclosure, even though it comes before the debtor becomes legally obligated, still comes so late in the day that in 99 cases out of 100 the debtor has already firmly made up his mind to make the purchase or the loan.

Where a credit card is being used, the situation is even worse. The disclosures required by the law are invariably printed on the reverse side of the credit card holder's copy of the credit sales invoice.[105] In 99 cases out of 100, the card holder will sign the invoice before he even sees the disclosures. Then, once the invoice is signed, it is extremely rare that even that minimal number of debtors which detects the disclosures will actually read them. The only time that the credit card user will really understand the cost of his credit is when his monthly statement comes in and he sees the annual percentage rate and the finance charge for the month specifically stated. Theoretically, he may then decide whether or not to continue to use that particular credit card. The problem, however, arises when it is realized that Master Charge, BankAmericard, Sears Revolving Charge, and all of the major oil company credit card plans presently charge exactly the same annual percentage rate.[106] How can there be shopping for credit when that is the fact?

This leads to another serious problem with disclosure. The draftsmen of the UCCC have set rate ceilings, rather than writing new usury laws, on the theory that credit should be available to practically everyone at a price. They have adopted disclosure rules and allowed free entry into the consumer credit market on the theory that this will foster competition and will result in rates being far below the ceiling set. It may, in fact, be that some creditors will have their rates below the ceilings. But where this occurs, it is submitted that all creditors within a category, *i.e.*, the banks, credit card plans, loan companies, will be charging exactly the same rate for the same type of credit. It is doubtful in Mississippi that different banks within a given community will charge different rates for consumer loans. And, where rates do differ, it is submitted that this will be because of the credit worthiness of the customer, not because of competition between banks. Furthermore, it is highly unlikely that the annual percentage rate used in connection with credit cards will in any way differ. These rates are the same now, and they may be expected to remain the same. It is possible that with the small loan companies there will be occasional rate wars. We would submit,

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[105] In examining the forms used by thirteen major oil companies with their credit cards and the forms used by BankAmericard and Master Charge, the author has found no exceptions to the above statement.

[106] The standard rate is 1½% per month, or 18% APR.

however, that in general, the rates charged by small loan companies for personal loans will not vary. This will be so primarily for the reason pointed out above that most consumer borrowers are not nearly so concerned with rates as they are with the amount of the monthly payment required.

In summary, disclosure is the law in Mississippi whether the UCCC is ever adopted or not. The economics of the consumer credit industry, including the cost of money, the risk involved, and the expenses of administration, will continue to set the finance charges imposed incident to the extension of consumer credit. Shopping around, it is submitted, will have only a minimal effect upon the cost of credit. From the viewpoint of the consumer, except possibly for those who will be shocked upon first realizing that an 8% "add-on" bank loan in fact is costing them something in the neighborhood of 14.5% simple interest, he will see no change under disclosure other than added red tape to the process of obtaining credit. The cost of this red tape, inevitably, will be passed on to the consumer.[107]

IV. Rights of Consumers Against Seller's Assignee

A. *Holders In Due Course*

One of the most controversial problems dealt with by the Uniform Consumer Credit Code is the holder-in-due-course doctrine. Under present Mississippi law, a person is a holder-in-due-course if he acquires an instrument in good faith, for value, and without notice of any defense to the instrument.[108] To the extent that a person is a holder-in-due-course, he takes the instrument free of practically all defenses of the maker of the instrument.[109]

In most commercial contexts, the holder-in-due-course doctrine is perfectly sound. In a dispute between the maker of the note and the innocent third party holder, the equities weigh against the maker who first introduced the note into the stream of commerce.[110] Problems arise, however, in the field of consumer credit sales. In the typical situation, John Doe will purchase a television from the XYZ Department Store, obligating himself to pay for the set by giving a promissory note. The note will call for installment payments. The note will be secured by a security agreement in which Doe grants to XYZ a security interest in the goods purchased. Frequently, the note will be physically affixed to

[107] Kripke, *supra* note 102, at 458-59.

[108] Miss. Code Ann. § 41A:3-302 (Spec. UCC Supp. 1967).

[109] Miss. Code Ann. § 41A:3-305 (2) (Spec. UCC Supp. 1967). *But see* Miss. Code Ann. § 41A:9-206 (1) (Spec. UCC Supp. 1967), where the collateral is consumer goods.

[110] *See, e.g.*, Craig v. City of Vicksburg, 31 Miss. 216 (1856).

the security agreement, which in pre-Uniform Commercial Code days would have been called a conditional sales contract or a retail installment sales contract. XYZ will then take the note and security agreement and sell them to the ABC Loan Company at a discount. If ABC takes without notice of any defense which Doe may have against XYZ, ABC becomes a holder-in-due-course. If the television set falls apart a month later, under present Mississippi law Doe must still pay ABC the full amount called for in the note.

The Supreme Court of Mississippi has recently made it crystal clear that unsuspecting consumers in this State will continue to be confronted with the holder-in-due-course doctrine until the legislature grants relief. In *Austin v. Atlas Subsidiaries of Mississippi, Inc.*,[111] the Austins had signed a contract with Housecraft, a Louisiana partnership, whereunder Housecraft was to install aluminum siding and make other repairs to the Austins' home. The Austins then executed a note in favor of Housecraft, secured by a deed of trust on their home. In due course, the note and deed of trust were sold to Atlas. The product and workmanship of Housecraft were defective. Then the Austins defaulted in the payment of the note. Atlas, clothed in the armor of a holder-in-due-course, demanded payment and, when payment was not forthcoming, Atlas foreclosed on the deed of trust. Meanwhile, Housecraft had disappeared into the night and there was "some indication that Housecraft is now defunct and incapable of responding in damages, but that fact cannot change the result in this case."[112] The result in the case was that the Austins lost their home.

There are many people like Solomon and Leodis Austin in the United States today, and their plight has led to a demand for legislative and judicial reform. The debate centers around the question of who should bear the burden of seeing that Housecraft fulfills its contract. Should this burden fall on the Austins, who are comparatively uneducated, who have never heard of Housecraft before, who have no practical means of checking on Housecraft, and who have no earthly idea that they will still have to pay the cost of the aluminum siding if it were to fall apart? Or should the burden be placed upon Atlas, which has superior knowledge and acumen in the consumer credit industry, which probably plans to purchase dozens, if not hundreds, of similar promissory notes from Housecraft, which should be in a position to demand a financial statement from Housecraft and understand what such a statement means, and which should be able to obtain a Dunn & Brad-

[111] 223 So. 2d 297 (Miss. 1969). *Compare* Jones v. Approved Bancredit Corp., 256 A. 2d 739 (Del. 1969), where the Delaware Supreme Court reached a result which is in serious conflict with *Austin*.

[112] 223 So. 2d at 299.

street report on Housecraft with little difficulty? Based upon the abuses of the past, and upon the realities of the typical tripartite consumer credit transaction, the scales have now been tipped in favor of the consumer.[113]

Section 2.403 of the UCCC provides that the seller in a consumer credit sale may not take a negotiable instrument from the buyer as evidence of the debt created. A promissory note which, if given in other commercial transactions, would be negotiable, is thus declared to be non-negotiable as a matter of law when given by the buyer in a consumer credit sale. Third party purchasers of such notes will have their protection in that the general knowledge of this law will pervade the financial community after the UCCC becomes law. Since finance companies discounting these notes will know of their consumer origin, holder-in-due-course status cannot be acquired.[114]

B. *Waiver-Of-Defense Clauses*

A more subtle device frequently employed by creditors in connection with consumer credit sales accomplishes the same result as the holder-in-due-course doctrine. A provision will be inserted in the security agreement, almost always on a form furnished by the finance company, which waives all defenses, which the buyer may have against the seller, in favor of the seller's assignee. These clauses will innocently begin "If seller should assign this contract to a third party . . ." and before it ends, the buyer, if he signs, has created a serious problem for himself. If the goods are not as warranted by the seller, and if the seller does not respond to the buyer's complaints, the buyer cannot use this as a defense in a suit by the finance company to collect the balance of the debt. Or, viewed from the standpoint of a responsible consumer, refusal to make any more payments is no longer available as a lever with which to prod the seller into making good his warranty.

An early version of the Uniform Commercial Code attempted to deal with this problem by making such waivers-of-defenses invalid. Vehement protests by the consumer finance industry, however, eliminated the provision.[115] The UCC, as enacted in Mississippi, provides that waivers-of-defenses by a purchaser in favor of the seller's assignee are generally valid.[116] The section, however, is expressly made "subject to any statute or decision which establishes a different rule for buyers

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[113] *See, e.g.*, Jones v. Approved Bancredit Corp., *supra* note 111.

[114] UCCC § 2.403, Comment.

[115] Kripke, *supra* note 102, at 470; 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 9.2 (1965); 2 *id.* § 41.5.

[116] MISS. CODE ANN. § 41A:9-206 (1) (Spec. UCC Supp. 1967).

of *consumer goods*."[117] In other words, UCCC or any other state law which dealt with the subject would override the general rules of the Uniform Commercial Code.

The UCCC offers state legislatures two alternatives in § 2.404.[118] Alternative A provides that an assignee of chattel paper arising out of a consumer credit sale is subject to all defenses of the debtor, notwithstanding an agreement to the contrary. The debtor cannot assert these defenses in an affirmative action. They may only be used as defenses in a suit by the assignee against the debtor. Further, the liability of the assignee is limited to the amount of the outstanding debt at the time the defense is asserted.

Apply Alternative A to the hypothetical case of John Doe, the XYZ Department Store, and the ABC Loan Company discussed above. Suppose the television set falls apart after Doe has made three monthly payments to ABC. If ABC brings suit on the note, Doe should be able to successfully defend because of XYZ's breach of warranty. Doe cannot recover the payments which he has made, and ABC cannot collect the remaining unpaid installments.

Alternative B is somewhat more complicated, but its basic purpose is the same as that of Alternative A and § 2.403. Alternative B requires the seller who wishes to discount his chattel paper with a financial institution to give a notice of assignment to the debtor. The notice must contain, among other things:

> a conspicuous notice to the buyer or lessee that he has 3 months within which to notify the assignee in writing of any complaints, claims or defenses he may have against the seller or lessor and that if written notification of the complaints, claims or defenses is not received by the assignee within the 3 month period, the assignee will have the right to enforce the contract free of any claims or defenses. . . .[119]

In addition, § 2.404 (2) in Alternative B provides in substance that the financing agency does not take the paper free of defenses, if it knows, or reasonably should know, that the seller is not responsible. If it knows from its own prior dealings with the seller that substantial complaints have been made by other consumers and that the seller has in the past failed to perform its contracts or failed to remedy its defaults, the finance company does not acquire the chattel paper free of defenses. Again, Alternative B limits the liability of the assignee to the amount of the debt outstanding at the time the defense is asserted and provides

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[117] *Id.*

[118] For further discussion of the decision to include alternative versions of UCCC § 2.404, see Jordan and Warren, *supra* note 35, at 436-38.

[119] UCCC § 2.404 (1), Alternative B.

that the defenses may be asserted only by way of defense to affirmative legal action by the assignee against the debtor.

The three month rule refers only to defenses of which the debtor became aware during the three month period. If the television set falls apart after four months, and XYZ has given a one year warranty, a Comment to Alternative B provides that the breach of warranty defense may still be raised by the debtor. In substance, what Alternative B provides that is not in Alternative A is that the debtor must act with some dispatch in giving notice to the assignee of the claim or defense. Creditors feel that this will discourage the "manufacture" of defenses by the debtor after default proceedings have begun.

C. *Criticisms of UCCC Waiver-of-Defense Rules*

Both versions of § 2.404 have been roundly, though not always rationally, criticized. Consumer interests have been particularly vocal in their denunciation of Alternative B, which they argue would in practice afford the consumer very little protection.[120] They argue that the notice from the assignee in all probability will not be read, and that if it is read, in all probability it will not be understood. Indeed, the argument is frequently heard these days that any law which requires intelligent, affirmative action on the part of the consumer is a creditor-oriented law.

Consumer organizations object to both Alternative A and B where the law provides that the assignee's liability is limited to the debt outstanding when the defense is asserted.[121] The television set, they argue, may fall apart while the debtor has only two payments left to make. In that event, both versions of § 2.404 would let the assignee keep what it had already collected from the debtor, a result which consumer advocates say is inequitable. In view of the fact that the debtor has had the use of the television set for many months during which he has been making his payments it is submitted that the UCCC rule is not quite as inequitable as consumer groups would have one believe.

A further objection on the part of consumer interests is made to the rule that defenses may be asserted against the assignee only by way of setoff or defense in a suit brought by the assignee.[122] This provision was placed in the UCCC primarily for the purpose of making it clear that the assignee would not be liable to the consumer on a breach of warranty suit. The scope of the provision, however, is broad enough to preclude recovery from the assignee of installment payments made by

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[120] CONSUMERS' ADVISORY COUNCIL, DEPARTMENT OF CONSUMER AFFAIRS, NEW YORK CITY, N.Y., REPORT ON THE UNIFORM CONSUMER CREDIT CODE 3-5, 7 (1969); 34 CONSUMER REPORTS, *supra* note 8, at 121, 124.

[121] CONSUMERS' ADVISORY COUNCIL, *supra* note 120, at 7.

[122] *Id.*

the consumer directly to the assignee. If these payments are viewed as a rental during the time that the consumer had the use of the goods, as indicated in the preceding paragraph, we do not consider the UCCC rule to be inequitable. In short, we believe that this objection should not be taken seriously. Under the UCCC the debtor will still have his traditional affirmative remedies against the seller for breach of warranty and the like.

In the opinion of consumer spokesmen, § 2.403 and § 2.404, whichever version is adopted, contain one fundamental omission: the lack of coverage of the consumer loan. A recent article in the official publication of the Consumers Union takes the position that, by only a slight adjustment in form, i.e., handling retail installment sales as consumer loans rather than as consumer credit sales, the credit industry will be able to completely nullify any protection that § 2.404 may afford the consumer.[123] XYZ Department Store, the consumers argue, will set up a wholly owned subsidiary corporation, the XYZ Loan Company. When the consumer tells the department store salesman that he would like to purchase the television set on a time basis, the salesman will direct him to the office of the XYZ Loan Company (probably located on another floor, or at worst in the building next door) which will proceed to make the consumer a loan in an amount necessary to purchase the television set. The consumer will grant the XYZ Loan Company a security interest in the television set. When the television set falls apart two months later and the consumer refuses to make any further payments, the XYZ Loan Company will point out that the UCCC does not make the lender in a consumer loan subject to the defenses of the buyer against the seller. Consumer groups argue that this situation will leave the debtors in the same situation they are now in under the holder-in-due-course and waiver-of-defense doctrines.[124]

History makes the cynicism of consumers hard to argue with. Any industry with the ingenuity to get around the problems incident to taking a chattel mortgage by inventing such devices as the conditional sales contract, the chattel deed of trust, the factor's lien, the trust receipt, and the like, is surely capable of inventing a device for avoiding the teeth of § 2.404. This raises a fundamental policy question: should a law such as the UCCC be designed to deal with present problems only, or should its scope be expanded to anticipate future evils? In Mississippi

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[123] 34 CONSUMER REPORTS, *supra* note 8, at 124.

[124] A serious discussion of this fear on the part of consumer groups is found in Littlefield, *Preserving Consumer Defenses: Plugging the Loophole in the New UCCC*, 44 N.Y.U. INTRA. L. REV. 272 (1969). For a thoughtful discussion taking the position that the courts should be able to deal with this practice which is feared by consumer groups, see Hogan, *Integrating the UCCC and UCC—Limitations on Creditors' Agreements and Practices*, 33 LAW & CONTEMP. PROB. 686 (1968).

today insofar as the present author is aware, the scheme feared by consumers does not exist. It is submitted that the UCCC should not at this time be amended to deal with it.[125] When Mississippi does enact the UCCC, and when, and if, the consumer loan device gains widespread use as a means of avoiding §§ 2,403 and 2.404, then, and only then, after a careful study of all of the ramifications of the new practice, should the legislature attempt to deal with the problem.

D. *Credit Industry Concerns About Subjection to Third-Party Defenses*

On the other side of the fence, financial institutions object to § 2.404 as being too consumer-oriented. They argue that the holder-in-due-course doctrine and its companion, the waiver-of-defenses clause, are a necessity in the field of consumer credit financing. Admittedly, loan companies, and even banks, do sometimes get taken to the cleaners by unscrupulous sellers. They do not always know, or have reason to know, in advance that the seller is likely to be peddling faulty merchandise, or that he is not able to back his warranty on that small percentage of his products that the law of averages says will break down. Even the most reputable sellers from time to time sell defective merchandise which for some reason is not covered by a warranty. Since lenders in this field have in good faith and for value parted with their money, usually on a non-recourse basis, these financial institutions argue that equity and economics require that they be given protection against the defenses of the debtor against the seller. These objections, it is submitted, ignore the fact that a bank or a finance company is much better able to protect itself and to absorb an occasional loss than is the consumer.

E. *Evaluation of UCCC Holder-In-Due-Course and Waiver-of-Defense Rules*

On balance, a rule outlawing waiver-of-defense clauses in consumer credit sales appears to be both sound and desirable. In the typical situation, the finance company has a more or less permanent arrangement with the seller to purchase the seller's chattel paper at a discount. Generally, it is the finance company which has the forms printed and fur-

[125] The primary problem with including consumer loans within the scope of §§ 2.403 and 2.404 is general lack of a permanent tie between the lender and the seller. It should be relatively easy for the finance company to police the dealer from whom it buys chattel paper on a continuing basis. It is quite another matter where the bank makes a consumer loan and has absolutely no relationship with the dealer from whom the debtor buys the television set. Also, where a bank credit card is being used, the equities seem to favor protecting the bank from dealer defaults. *See* Jordan and Warren, *supra* note 35, at 437-38.

nished to the seller. It is the finance company which has the waiver-of-defense clause included in the security agreement, and the seller probably never notices this provision himself. The forms will also contain endorsement or assignment clauses in most situations, usually providing blanks for both recourse and non-recourse assignments. These endorsements will even contain the name of the finance company printed in the appropriate places. Indeed, it is frequently the seller which has to fill in his name, not the assignee. Further "Freedom of Contract" in consumer credit sales is purely illusory from the point of view of the consumer. He either signs the prescribed forms, or he doesn't get the television set. With this much control being exercised over the transaction by the finance company, and with the finance company's superior bargaining position and ability to "police" the seller, waiver-of-defense clauses are indefensible.[126]

True, an elimination of the holder-in-due-course doctrine and the waiver-of-defense clause might slightly upset the economic balance heretofore existing between sellers and their finance companies. Finance companies might have to increase their loss reserves to meet this change. Sellers may find that they can negotiate their chattel paper only on a full recourse basis. They may also find their finance companies demanding a higher discount on the purchase of chattel paper. Or, under the high rate ceilings in the UCCC, credit service charges might be increased, thus passing this added cost on to the general consumer public. It is submitted that, one way or another, the ever booming consumer credit finance industry can more than absorb and adjust to these changes without anybody going out of business. When this is weighed against the impact on the individual consumer of a default proceeding where the television set or the aluminum siding has completely fallen apart, the UCCC rule appears to be a fair balance of the interests involved.

It is submitted that Alternative A to § 2.404 is sound; its adoption in Mississippi is recommended. The compromise contained in Alternative B would most likely satisfy no one. The rules of Alternative A are simple and clear, much more so than Alternative B. They may result in much less non-recourse financing and a great deal more investigation of aluminum siding companies by banks and finance companies. And, realistically, new businesses may find some difficulty in marketing their chattel paper. In the final analysis, it is submitted that Alternative A, if enacted in Mississippi, "will fall more heavily on the unjust than on the just."[127]

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[126] This conclusion is supported by Professor Homer Kripke, one of the leading creditor-oriented spokesmen for the UCCC. Kripke, *supra* note 102, at 469-73.

[127] Johnson, *Uniform Code for Consumer Credit*, 46 HARV. BUS. REV. 119, 123 (1968).

V. Restrictions on Door-to-Door Salesmen

A. *Home Solicitation Sales*

Door-to-door salesmen are singled out for special treatment in the Uniform Consumer Credit Code. This is because of a belief that home solicitation sales give rise to a high number of legitimate consumer grievances. The UCCC draftsmen acknowledge in an official Comment that they have proceeded upon "the belief that in a significant proportion of such sales the consumer is induced to sign a sales contract by high pressure techniques."[128] Still, a careful study of the UCCC rules governing home solicitation sales makes it clear that the draftsmen recognize that there are many completely responsible businesses that distribute their product through this method. The UCCC will not significantly hamper these businesses.

In order to be covered by the UCCC home solicitation sales provisions, the sale must meet two conditions. First, it must be made through a personal solicitation at a residence of the buyer. Second, the buyer must take the action which binds him to make the purchase at his home.[129] The salesmen can take the sale out from under these special UCCC rules by asking the buyer to come into the seller's office the next day and sign the necessary papers. But if the original solicitation and the sale itself take place at a residence of the buyer, a special set of rules apply.

B. *Consumer's Right to Cancel Home Solicitation Sale*

First, and foremost, the buyer has the right to cancel the sale until midnight of the third business day following the sale.[130] The cancellation must be in writing[131] and becomes effective when it is deposited in a mailbox properly addressed and postpage prepaid.[132] No particular form need be used by the buyer cancelling the sale, so long as there is contained somewhere in the written notice an expression by the buyer that he wishes not to be bound by the sale.[133] The risk of non-receipt of a mailed cancellation notice is on the seller.[134] The buyer, however,

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[128] UCCC § 2.501, Comment 1.

[129] UCCC § 2.501.

[130] UCCC § 2.502 (1). Many creditors greatly fear right to cancel rules. Mississippi, however, has had a limited right to cancel rule for years in automobile sales. Miss. Code Ann. § 8075-13 (a) (3) (Supp. 1968). Also, federal law now gives the debtor a three day "cooling off period" in any transaction where the creditor obtains a security interest in the debtor's home (except a first mortgage). 15 U.S.C. § 1635 (Supp. IV, 1969).

[131] UCCC § 2.502 (2).

[132] UCCC § 2.502 (3).

[133] UCCC § 2.502 (4).

[134] UCCC § 2.502, Comment 2.

has the burden of establishing that he did in fact properly mail the notice.

It is one thing to provide by law that a consumer has certain rights. It is an entirely different matter to explain to him that he has these rights in a manner that affords him the opportunity to exercise them effectively. The UCCC attempts to deal with this problem by requiring the salesman to include in the sales agreement a prescribed cancellation notice "under the conspicuous caption: 'BUYER'S RIGHT TO CANCEL.' "[135] The notice must read as follows:

> If this agreement was solicited at your residence and you do not want the goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want the goods or services and must be mailed before midnight of the third business day after you sign this agreement. The notice must be mailed to: _____ (insert name and mailing address of seller). If you cancel, the seller may keep all or part of your cash down payment.[136]

The content of the prescribed notice has drawn fire from at least one consumer group.[137] The Consumers' Advisory Council in New York City has taken the position that, whereas the notice might be adequate to inform a middle class consumer of his rights, an uneducated, low income buyer, who probably needs protection from door-to-door salesmen most of all, will probably not understand the notice. This group takes the position that words such as "third business day" and "solicited" will be confusing to the unsophisticated consumer. They would prefer that a perforated card containing the cancellation notice be attached to the sales agreement. If the buyer wanted to cancel, he would simply detach the card and place it in the mailbox. The card would be serially numbered and the salesman would keep records of the serial numbers so that he could match any cards received with the correct sale.[138]

It is submitted that the UCCC cancellation notice adequately conveys the intended message. While we would have no serious objection to the Consumers' Advisory Council's proposed cancellation, we are somewhat annoyed by the attitude of some consumer groups that any law which either requires a consumer to think for himself or to exercise any initiative is unfair. No one could seriously contend that consumers are in a position to bargain equally with salesmen, particularly door-to-door salesmen. Yet, we do not think it unfair to require that a consumer use a little common sense or to act with reasonable prudence.

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[135] UCCC § 2.503 (2) (a).

[136] UCCC § 2.503 (2) (b). Compare the required right to cancel notice where the debtor grants a security interest in his home. Federal Reserve Regulation Z § 226.9 (b).

[137] CONSUMERS' ADVISORY COUNCIL, *supra* note 120, at 14-15.

[138] *Id.*

C. *Emergency Sales and Down Payments*

The UCCC takes into consideration the fact that from time to time home solicitation sales will take place in situations which are emergencies from the point of view of the consumer. He cannot afford to have the seller wait out the three-day rescission period before starting on the repairs or before delivering the product. Common examples of emergencies are broken water pipes, furnaces, appliances and the like. Under such situations, § 2.502 (5) provides that the buyer may not cancel the transaction where the buyer has requested the seller to deliver the goods or provide the services without delay because of an emergency. The UCCC protects the seller who in good faith relies upon the buyer's representation that an emergency situation exists and that performance must be immediate. In such cases, the buyer does not have the right to cancel.

A more important protection for legitimate sellers is found in the treatment of the down payment. It is the policy of the UCCC to encourage home solicitation sellers to require down payments, on the assumption that the buyer is much less likely to make a foolish deal if he has to part with a down payment while the salesman is still on the scene.[139] Where a down payment is obtained, if the buyer exercises his right of cancellation, the seller may retain as a cancellation fee five percent of the cash price or the down payment, whichever is less.[140] The seller thus is protected against the buyer who freely and voluntarily entered into a contract with the seller but has simply changed his mind within the three day period. If the seller does not obtain a down payment, however, he is not entitled to receive anything as a cancellation fee.

D. *Rights of Parties After Cancellation of Home Solicitation Sale*

When a buyer exercises his right to cancel a home solicitation sale, the UCCC provides that the seller, within ten days after the cancellation, must return to the buyer any payments which the buyer has made, minus the cancellation fee, together with any note or other evidence of indebtedness obtained in connection with the sale.[141] Inexplicably the Code does not require the seller to return any security agreement which the buyer may have signed, or to file a termination statement covering any financing statement which the seller may have filed against the debtor. The buyer already has protection on this point, however, because the Uniform Commercial Code gives him the right to require the creditor to file a termination statement.[142] And, any attempt at foreclo-

[139] UCCC § 2.504, Comment 3.
[140] UCCC § 2.504 (3).
[141] UCCC § 2.504 (1).
[142] UCC § 9-404 (1).

sure (assuming that collateral other than the goods sold was covered in the security agreement) by an unscrupulous creditor could be defeated on the premise that there was no longer any outstanding debt.

If the down payment made by the buyer exercising his right to cancel includes used goods on a trade-in proposition, these goods must be returned by the seller in substantially as good condition as they were delivered by the buyer at the time of the sale.[143] If the seller fails to tender the goods within the ten day period, the buyer may elect to recover in cash an amount equal to the trade-in value of the unreturned goods. Until the seller his complied with his obligations to return the down payments, notes, or trade-in allowances, the buyer may keep the goods delivered to him and the law gives him a lien on those goods to secure the performance by the seller of his UCCC obligations.[144]

Finally, where the buyer has cancelled a home solicitation sale, the seller must demand return of the goods within a reasonable time.[145] He may not, however, demand return of the goods at any place other than the buyer's residence.[146] If the seller fails to demand repossession within forty days, the UCCC declares that the goods become the property of the buyer without any obligation to pay for them.[147] This provision will protect the consumer from a disgruntled seller who, knowing of the buyer's duty to keep the goods without harming them, seeks to make this obligation a burden upon the buyer for an unreasonable length of time.[148] Since no reputable seller of common business intelligence is going to let the buyer acquire title to the goods without obligation to pay, it is doubtful that anyone need have any fear of this rule.

The UCCC rules on home solicitation sales, like many other parts of the Code, have drawn fire from both spokesmen for the door-to-door salesmen and from the consumer interests. It is argued by these salesmen that many products can be fully and intelligently presented to the consumer only in a home situation, where the goods may be demonstrated and where time is no real factor. The many legitimate door-to-door salesmen feel that they are being unfairly restricted by the down payment, right to cancel, and other consumer protection provisions of this part of the UCCC. They argue that the new rules will be abused by many buyers who will simply change their minds after the salesman leaves.

Consumers, on the other hand, argue that the cancellation notice

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[143] UCCC § 2.504 (2).
[144] UCCC § 2.504 (4).
[145] UCCC § 2.505 (1).
[146] *Id.*
[147] *Id.*
[148] UCCC § 2.505, Comment 1.

is not clear enough, as has been pointed out above. Also, they argue that the 5% cancellation fee should be eliminated, and that the seller should only be allowed to retain his out of pocket expenses incurred in connection with the cancelled sale.[149] On balance, however, it is submitted that the home solicitation rules are strong enough to correct the abuses of the past. They will not significantly hamper legitimate business.

E. *Referral Sales Schemes*

Frequently, as a part of the home solicitation salesman's technique, a referral sales scheme will be used. Under this procedure, the salesman will generally tell the buyer that the price of the goods which the buyer is purchasing will be reduced by a certain given amount for every name the buyer supplies, provided that such person whose name is furnished by the buyer subsequently buys from the seller.[150] In the typical scheme, the seller's obligation to reduce the price to be paid by the buyer is purely contingent. If no one on the list of names which the buyer furnishes to the seller makes a purchase from seller, the price for which the buyer contracted with the seller stands. Through this scheme, door-to-door salesmen have frequently made the highly inflated prices of their wares much more acceptable to the buyer. It is not at all unusual for the salesman to tell the buyer that, if the buyer furnishes the names of say, twenty-five people and all twenty-five of these people make a purchase from the salesman, then the buyer will have no obligation to pay whatsoever. The hopes raised by this scheme are generally dashed, first, by the fact that the buyer's friends are not always as gullible as the buyer himself and, second, more importantly, by the holder-in-due-course doctrine, or its companion, the waiver-of-defense clause. As soon as the sale has been completed, the typical seller will immediately assign it to the finance company which will innocently protest to the buyer that it knows absolutely nothing about any promise to reduce the purchase price of the goods.[151] The buyer is therefore completely out in the cold, quite frequently holding goods which he would never have bought had he realized that he would have to pay the actual purchase price.

The draftsmen of the UCCC consider this practice to be among the most vicious within the credit industry.[152] Section 2.411 provides that the seller may not give or offer a rebate or discount as an inducement

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[149] CONSUMERS' ADVISORY COUNCIL, *supra* note 120, at 15.

[150] For a thorough consideration of the various legal facets of this scheme, see Annot., 14 A.L.R.3d 1420 (1967).

[151] This is one of the evils which the Mississippi Supreme Court failed to deal with in Austin v. Atlas Subsidiaries of Mississippi, Inc., 223 So. 2d 297 (Miss. 1969).

[152] Jordan and Warren, *supra* note 35, at 441-43.

for a sale if the earning of the rebate or discount is contingent upon the occurrence of an event subsequent to the time of the sale. In other words, if the reduction in the purchase price is contingent upon whether or not the persons, whose names the buyer furnishes to the seller, actually buy from the seller at some future date, then the scheme is prohibited by the UCCC. On the other hand, if the price reduction is not contingent on whether or not the people on the list furnished by the buyer do in fact buy from the seller, then § 2.411 has no application. It is the contingency aspect of the referral sales scheme which raises false expectations in the buyer at which the UCCC is pointed.

Harsh consequences befall the seller who engages in the referral sales practice. Not only does § 2.411 make the agreement in violation of its provisions unenforceable, but it also allows the buyer to retain goods sold or the benefit of the services rendered with no obligation to pay for them. Or, in the alternative, buyer may rescind the agreement, return the goods, and recover any payment made.

The referral sales scheme in the opinion of the present author is frequently practiced in Mississippi. It is most commonly used in dealing with the low income and uneducated consumer, and generally in the context of a home solicitation sale. This practice is widely abused by door-to-door salesmen in that the buyer victimized by such a scheme almost never receives the promised rebate or discount. Consequently, it is submitted that the provisions of § 2.411 are sound and should be a most welcome consumer protection statute in Mississippi.

VI. Prohibitions on Excess Security

In Mississippi, as in other states, there have from time to time been creditors, generally the small loan companies, who were greedy in the securing of debts owned to them. In consumer credit sales or consumer loans with low income or uneducated debtors, these creditors take security interests in practically everything a debtor has. It is a common practice for loan companies in this state to secure personal loans to low income debtors with a security agreement covering every item of personalty in the debtor's house. Almost as frequently these creditors will take second mortgages on the debtor's home.

The UCCC contains rules designed to curb the greediness of these creditors. In the case of a consumer credit sale, the seller, of course, may take a security interest in the goods sold.[153] And, under certain circumstances, the seller may take a security interest in other consumer goods owned by the debtor where the seller already holds a prior security interest in those goods arising out of an earlier consumer credit

[153] UCCC § 2.407 (1).

sale.[154] Except for that situation, however, the seller of goods may take a security interest in goods or lands of the debtor other than the goods which are the subject of the sale only if the debt secured is substantial.[155] Furthermore, the additional goods taken as security must have been goods which were the object of services rendered by the seller, or they must have been goods in which the newly purchased goods were installed. The land must have been land to which the newly purchased goods have become affixed.[156] The additional goods can serve as security only where the debt secured is greater than $300.[157] The land can serve as additional security only where the debt secured is greater than $1,000.[158]

With respect to a security interest in land, § 3.510 sets forth a similar rule. In the case of a supervised loan in which the principal is $1,000[159] or less, the creditor may not take a security interest in real property owned by the debtor. Whether the transaction be a loan or a sale, a security interest in lands or in additional goods taken in violation of the above stated rules is void.

The rules on additional security in sales found in § 2.407 and on land as security in loans found in § 3.510 are sound. In the first place, in the case of a consumer credit sale, a security interest in the goods sold is usually adequate to secure the creditor. Further, unless the debt is substantial, a creditor should not need a security interest in realty owned by the consumer, almost always his home. The UCCC rules will protect the consumer from giving an imprudent second mortgage on his home to a foreclosure-minded loan company.

Regrettably, there is still one loophole in this area in the case of consumer loans. No attempt is made by the UCCC to place a limit on the value of the personal property in which the finance company may take a security interest in proportion to the amount of the debt secured.[160]

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[154] UCCC § 2.408.

[155] UCCC § 2.407, Comment 1.

[156] UCCC § 2.407 (1).

[157] The $300 amount will probably be $330 by the time Mississippi enacts the UCCC. *Supra* note 2.

[158] The $1,000 amount will probably be $1,100 by the time Mississippi enacts the UCCC. *Supra* note 2.

[159] *Id.*

[160] Whether or not the absence of a limitation on the value of personal property which may be given as security for a consumer loan as a "loophole" is open to debate. In most secured loans, where the collateral is consumer goods, it is extremely difficult for the lender to place a realistic value on his collateral. In certain consumer loans, we can see how a restriction on the right of the debtor to grant a security interest in his land or his car might work to the debtor's prejudice by forcing the debtor to borrow at higher rates. A similar comment might also be made with reference to the fact that the UCCC provisions curbing deficiency judgments do not cover consumer loans.

An uneducated debtor may still find himself granting a security interest in $1,000 worth of furniture to secure a $300 loan. In the event of default proceedings, chances are that such a debtor will still lose all of his furniture. The fair market value of the debtor's furniture will always be much lower than its replacement value. Though an attorney could certainly protect such a debtor when foreclosure is begun, if the debtor can't pay his note he is even less likely to be able to pay an attorney's fee. It is submitted that the consumer finance industry should have no complaint about §§ 2.407 and 3.510.

VII. Ban on Confession Judgment Clauses

The fine print in security agreements in many states frequently contains confession of judgment provisions. Typically, these clauses provide that, in the event of default by the debtor, the holder of the contract is authorized to enter the appearance of the debtor in a civil action commenced in any court of competent jurisdiction and to confess judgment in favor of the creditor and against the debtor in the amount of the debt as of the date of default. This type of provision is conceptually similar to a power of attorney. By having signed the contract the defaulting debtor has granted a power of attorney to the creditor, or to someone of the creditor's choosing, to make the confession of judgment. Needless to say, the confession of judgment takes place without notice to the debtor. The first notice the debtor gets is usually a writ of garnishment.

This practice has never been a problem in Mississippi because it was made unlawful by statute at least as early as 1822.[161] Today Mississippi law provides that a power of attorney granted in advance of the filing of the lawsuit for the purpose of allowing a confession of judgment "shall be absolutely null and void."[162] The Mississippi Small Loan Regulatory Act contains a more specific prohibition of confession judgments.[163] Of course, nothing in present Mississippi law or in the UCCC prohibits a debtor from confessing judgment after suit has been filed and after process has been served upon him.

The Uniform Consumer Credit Code contains two sections prohibiting confession judgment clauses. Section 2.415 provides that a consumer may not authorize any person to confess judgment on a claim arising out of a consumer credit sale or consumer lease. Section 3.407 contains a similar provision with reference to consumer loans. Both sections provide that an authorization in a security agreement in violation of the prohibition shall be void.

[161] Miss. Code ch. 61, art. 1, § 94 (Hutchinson 1848). *But see id.* art. 6, §§ 1-8.
[162] Miss. Code Ann. § 1545 (1956).
[163] Miss. Code Ann. § 5591-14 (b) (Supp. 1968).

The ban on confession judgments, like the restriction on garnishments[164] and wage assignments,[165] is based upon the view that a debtor should have the right to be heard before the creditor becomes irrevocably armed with the means of depriving the debtor of his livelihood. It is further predicated upon the assumption that few, if any, debtors ever read such provisions when they are contained in security agreements, and it is highly doubtful that any but the most sophisticated would understand such provisions even if he did read them. Since confession judgments have been contrary to public policy in Mississippi for more than a century, this aspect of the UCCC should certainly cause no controversy in the legislature.

VIII. Curbs on Deficiency Judgments

Goods sold on credit frequently are subject to rapid depreciation in value. In many default proceedings, the creditor may find that he has repossessed collateral which has a fair market value less than the amount of the debt. Under the present practice, many creditors in such situations bring suit against the debtor and obtain deficiency judgments. These judgments include not only the amount of the debt over and above the value of the repossessed collateral, but also the expenses, including attorneys fees, of the creditor incurred in the default proceedings.

As a general proposition, the above procedure is economically justifiable and the law of commercial transactions should not restrict it. A specific evil does exist, however, in Mississippi and in many other states that has drawn the attention of the draftsmen of the UCCC. In the case of a low income debtor, many small loan companies and retail installment sellers, after repossession, routinely obtain deficiency judgments, knowing that there is no real prospect that the debtor will ever be able to pay. These creditors have the judgments enrolled and held over the head of the debtor for the next seven years.[166] They keep up with the debtor's whereabouts, and the moment he gets a job, they have a writ of garnishment issued. The debtor is usually fired, and then he spends months looking for another job.[167] When he finds one, the process is repeated.

The UCCC rules on deficiency judgments can be supported by much the same philosophy as the bankruptcy laws. They provide that once a creditor repossesses, in a consumer credit sale where the cash price of the goods was less than $1,000, that ends the matter insofar

[164] UCCC §§ 5.104 to 5.106.

[165] UCCC § 2.410.

[166] Miss. Code Ann. § 735 (1956). *See also* Miss. Code Ann. § 1555 (1956).

[167] Badly needed limitations will be placed on this practice on July 1, 1970. 15 U.S.C. §§ 1671-77 (Supp. IV, 1969). *See also* UCCC § 5.106.

as the debtor is concerned. Section 5.103 (2) states that the defaulting debtor "is not personally liable to the repossessing creditor for the unpaid balance of the debt arising from the sale of goods." The debtor is thus free to start out anew without having to constantly deal with the numerous problems incident to having an enrolled judgment outstanding against him.

Actually, § 5.103 gives the creditor an option. He may repossess, or he may sue on the note which he holds, but he may not do both. And, § 5.103 (6) provides that the creditor may not obtain a judgment based on the underlying indebtedness and then attach, or levy execution upon, the collateral. The UCCC is clear that the creditor in this instance may not do indirectly that which he is prohibited from doing directly.

There is one curious thing about § 5.103—it covers only consumer credit sales. A consumer loan may well have been used by the consumer to purchase goods costing less than $1,000 in which the debtor has granted the loan company a purchase money security interest. Is the debtor who obtains a loan and then buys an air conditioner in a substantively different position from the debtor who has bought the air conditioner on time with the chattel paper having been sold to the finance company?[168] We think not. The debtor in a consumer loan situation needs just as much protection from the harrassment of a deficiency judgment as the debtor in a consumer credit sale. The UCCC comment to § 5.103 gives no explanation for this apparent anomaly.

In passing judgment upon the rule of § 5.103, one needs more empirical data than is available. How many deficiency judgments are ever actually paid, voluntarily or involuntarily? It is our suspicion that the amount of actual collections of deficiency judgments, where the original transaction was a consumer credit sale with the goods having an original cash price of less than $1,000, is negligible. If this is so, are creditors actually losing very much by the enactment of § 5.103? When the loss to the creditor is balanced against the effect that a deficiency judgment can have upon the individual debtor for years thereatfer, it is submitted that some restriction on the right to obtain a deficiency judgment is clearly justifiable. There comes a point where the defaulting debtor, even the deadbeat, deserves the right to be rid of his creditor once and for all. Section 5.103 properly puts that point at the time of repossession.

It is our belief that the economic impact of § 5.103 in Mississippi would be slight, if noticeable. In the overwhelming majority of defaults in consumer credit sale transactions today, all that the creditor ever

[168] Here again, the UCCC distinction between consumer credit sales and consumer loans is subject to question. *Supra* note 61.

gets to apply to the debt is the repossessed collateral. We are confident that were § 5.103 to become law, creditors covered by it would elect repossession over a suit on the underlying obligation in 98 percent of the cases. This type of debtor, if he were able to pay the debt, would never have defaulted in the first place.

The only thing wrong with § 5.103 is that it covers only consumer credit sales. We submit that it should be amended to cover consumer loans of $1,000 or less before enactment in Mississippi.

IX. Regulation of Garnishments and Wage Assignments

Throughout the Uniform Consumer Credit Code the results of many value judgments may be found. One of the most important of these value judgments which has been made by UCCC draftsmen is that it is important that a man have a job and that the wages which he earns on the job be available for the necessary support and maintenance of his family. The UCCC contains four rules which are designed specifically to protect the consumer in his job and his paycheck. Three of these rules deal with garnishments.

A. *Pre-Judgment Garnishments*

Section 5.104 is a prohibition against pre-judgment garnishments. Prior to the entry of judgment against the consumer (debtor) in an appropriate civil action, the creditor cannot tie up the debtor's wages through a garnishment proceeding. The section is restricted to those situations where the underlying indebtedness arises out of a consumer credit sale, a consumer lease, or a consumer loan.

Such a rule would be nothing new for Mississippi. Garnishments in Mississippi have always been limited to those instances where the creditor had first obtained a valid and enforceable judgment against the debtor.[169] Furthermore, pre-judgment garnishments have recently been held to be unconstitutional anywhere in the United States and regardless of the source of the underlying indebtedness in *Shiadach v. Family Finance Corp.*[170] There the U.S. Supreme Court held that the freezing of a man's wages, prior to his having had the opportunity to defend a suit based on the merits of the debts, was a denial of due process. A debtor thus may not be constitutionally deprived of the use of the garnished portion of his wages during the interim period between the initiation of the garnishment and the entry of judgment in the underlying lawsuit.

In short, § 5.104 is law in this state, whether Mississippi ever adopts the Uniform Consumer Credit Code or not.

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[169] Miss Code Ann. § 2783 (1956).

[170] 395 U.S. 337 (1969).

B. *Exemption of Wages from Garnishment*

On the basis of pure equity and fair play, it is difficult to quarrel with the rule prohibiting pre-judgment garnishments. A difference of opinion does develop, however, over the percentage of a man's wages that should be exempt from the levy of the judgment creditor's writ of garnishment.[171] UCCC § 5.105 (2) provides that no more than 25% of the debtor's disposable earnings per week, or no more than the amount by which his disposable earnings for that week exceeds forty times the federal minimum wage,[172] whichever is the lesser, may be withheld. In other words, the first $64.00 of a debtor's disposable earnings will always be exempt. The 25% rule will not come into play until the debtor's disposable earnings reach $85.33.

The variation from present Mississippi law is found in the UCCC concept of disposable earnings. Under the UCCC the 25% rule is applied to the debtor's take home pay, that is, his pay after all legally required deductions for taxes, social security, etc. have been withheld. Mississippi's exemption statute[173] is similar to the UCCC in its 25% rule, but provides that the percentage shall be applied to the debtor's gross pay prior to any deductions. From the standpoint of Mississippi law, therefore, the UCCC would appear to favor the debtor.

The difference between the present Mississippi law and the UCCC will become purely a matter of academic interest on July 1, 1970. On that date, Title III of the Consumer Credit Protection Act will become effective. Section 302 (b) of the CCPA adopts the "disposable earnings" concept that is found in the UCCC.[174] There is one difference between the UCCC and the CCPA, however. The UCCC, as noted above, exempts wages equal to forty times the minimum wage in effect at the time, or $64.00 per week.[175] Section 303 (a) (2) of the CCPA, however, exempts only thirty times the federal minimum hourly wage, or $48.00 per week.[176] Were Mississippi to enact the UCCC, the exemption for forty times the minimum hourly wage would control because the CCPA provides that the provisions of the federal law in no way excuse compliance with the stricter provisions of any state law dealing with the subject of garnishments.[177]

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[171] See the chart of the laws of all fifty states in B. CURRAN, *supra* note 11, at 338-41.

[172] The federal minimum wage is set by the Fair Labor Standards Act. 29 U.S.C. § 206 (Supp. IV, 1969).

[173] MISS. CODE ANN § 307 (Supp. 1968).

[174] 15 U.S.C. § 1672 (b) (Supp. IV, 1969).

[175] UCCC § 5.105 (2).

[176] 15 U.S.C. § 1673 (a) (2) (Supp. IV, 1969).

[177] 15 U.S.C. § 1677 (Supp. IV, 1969).

Section 5.105 has been the subject of strong criticism by consumer interests around the country. For example, present New York law exempts 90% of a man's wages from garnishments.[178] The highly organized consumers of that state are naturally opposed to a lowering of the exemption percentage to 75%[179] The real objection to § 5.105, however, is to be found in the fundamental unacceptability of garnishment of wages at all to consumer groups. These advocates point out in support of their case that Florida,[180] Pennsylvania[181] and Texas[182] have outlawed the garnishment of wages without apparent adverse effect upon the credit industry.[183]

On balance, § 5.105 appears to be sound. On the one hand, the only way that many debtors can pay their debts is out of their wages. It seems a bit arbitrary to provide that under no circumstances can a judgment creditor obtain payment of a debt out of the debtor's only means of payment. Furthermore, those who object to the garnishment of wages do so out of a concern for the debt-ridden wage earner. Rather than protecting this group of consumers, however, a more likely effect of the abolition of wage garnishments would be the restriction of credit available to low wage earners, or perhaps, an increase in the cost of credit available to low wage earners, or perhaps, an increase in the cost of credit to that group of consumers.

On the other hand, the current version of § 5.105 probably comes very close to incorporating what the Mississippi legislature originally had in mind when § 307 of the Mississippi Code was enacted. Income tax and social security deductions now remove a substantial amount each week from his paycheck. The purpose of § 307 of the Mississippi Code was obviously to leave the debtor with enough of his earnings to adequately provide himself and his dependants with the necessities of life. It is submitted that § 5.105 of the UCCC would accomplish that purpose far more realistically than the present Mississippi exemption statute.

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[178] N.Y. PERS. PROP. LAW § 48-a (McKinney 1961). Nebraska and Ohio also have 90% exemption laws. NEB. REV. STAT. § 25-1558 (1964); OHIO REV. CODE ANN. § 2715.30 (Page 1953).

[179] CONSUMERS' ADVISORY COUNCIL, *supra* note 120, at 13-14.

[180] FLA. STAT. § 222.11 (1956).

[181] PA. STAT. tit. 42, § 886 (1966).

[182] TEX. CONST. art. 16, § 28.

[183] It is noteworthy here that nothing in the UCCC authorizes garnishments. That policy decision is beyond the scope of the New Code. The UCCC only places limits upon the portion of a debtor's wages which will be subject to garnishment where the debt arose out of a consumer credit transaction. Presumably, in states such as Florida, Pennsylvania and Texas, UCCC §§ 5.104 through 5.106 should be deleted.

C. *Prohibitions Against Discharge of Employee Because of Garnishment*

The next wage protection rule in the UCCC is the most fundamental of all. Section 5.106 provides that an employee may not be discharged because his wages have been garnished. Here the draftsmen of the UCCC have made a value judgment which, it is submitted, is completely sound. With all due respect to those who engage in it, the common practice throughout industry in Mississippi of discharging an employee whose wages have been garnished is a disgrace and should be ended immediately. This policy will be partially restricted beginning July 1, 1970, when § 304 (a) of the CCPA goes into effect, providing that an employer may not discharge an employee for the first garnishment.[184] The UCCC is broader and prohibits discharge no matter how many garnishments are levied on the employee's wages. It should be be noted, however, that § 5.106 of the UCCC applies only to garnishments where the underlying debt arose out of a consumer credit sale, consumer lease, or consumer loan. Section 304 (a) of the CCPA contains no such limitation.[185] Therefore, were Mississippi to enact the UCCC, employees could not be fired under any circumstances because of first garnishment. They could not be fired at all because of garnishments, regardless of the number, arising out of consumer credit transactions. If a second garnishment did not arise out of a consumer credit transaction, however, there is no provision of law in the UCCC or the CCPA which would prevent the employer from discharging the employee.

Employers in this and other states have frequently tried to justify the practice of discharging an employee whose wages are garnished, by arguing that this imposes an administrative burden upon the employer. Some personnel managers have been heard to argue that "we are not a collection agency." Many larger industries claim that additional personnel would have to be hired to handle the administrative end of garnishments.

The argument of the employers is suspect. First, it should be noted that employers already make numerous withholdings from an employee's wages. These range from the legally required federal and state taxes to employee group insurance premiums to union dues and even to local United Fund or Community Chest donations. Certainly, one more deduction could not impose that much of an administrative burden upon an employer which has already set up the administrative machinery to handle four or five deductions from each employee's wages. And, should there be additional costs imposed upon the employer, it is submitted that these costs should be absorbed by the employer and

[184] 15 U.S.C. § 1674 (Supp. IV, 1969).

[185] *Id.*

passed on to the public in the form of increased prices. The day when the administrative convenience of the employer is considered more important than the employee's right to keep his job, if he is performing it in an otherwise satisfactory manner, has long since passed. Perhaps the value judgments involved in § 5.106 might have been properly weighted in favor of the employer in the 1890s. Today, however, the arguments of the employer on this point are not only highly questionable in terms of their factual basis, but are in complete conflict with firmly established national social policy.[186] In short, we do not understand how any legitimate objection can be made to the no discharge provisions of § 5.106.

In this connection it might be noted that a violation of § 304 of the CCPA will bring about a $1,000 fine or one year imprisonment or both if the violation is wilful. A violation of § 5.106 of the UCCC will subject the employer to a civil suit for damages in the course of which the court may also order the employer to give the employee back his job. When the prospect of enforcing the no discharge provisions of either the federal CCPA or the state enacted UCCC are considered, it does become apparent that problems will be presented. How will an employee ever be able to prove that he was discharged because of a garnishment? If much litigation results under this section, it may be safely assumed that employers will resort to numerous otherwise minor failures of the employee to perform his job satisfactorily or to comply with industry regulations. As a practical matter, it is submitted that courts considering the enforcement of either the federal or state act should adopt a rule to the effect that any employee discharged within a given number of days following a garnishment will be presumed to have been discharged because of the garnishment. This presumption, of course, would be rebuttable, but the courts should further require the employer to carry the burden of rebutting the presumption by clear and convincing evidence. It is submitted that such a court-made rule is a practical necessity if the no discharge statute is to have any real force.

D. *Irrevocable Wage Assignments Illegal*

The fourth provision of the UCCC protecting wages of the employee is § 2.410.[187] This section provides that an employee may not make an irrevocable assignment of his earnings as security in a consumer credit transaction. The section does not, however, prevent an employee from authorizing the employer to make deductions from his

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[186] 15 U.S.C. § 1021 (1964).

[187] Compare the similar provisions of UCCC § 3.403.

wages and pay them over to a creditor, provided the authorization is revocable by the employee.

Except where prohibited or restricted by statute, assignments of future wages are generally permitted around the country.[188] If the statutory procedure is followed, wage assignments are allowed in Mississippi.[189] The enactment of the UCCC and § 2.410 would bring about a reversal of the law in Mississippi. As a practical matter, however, we doubt that many creditors, with the possible exception of credit unions, employ this device to secure their debts in Mississippi.

Section 2.410 is predicated upon the same judgment which forms the basis of the other three sections discussed above. Again, the presumption is that the social cost of depriving a man of his wages, even if he gives an advance consent to that deprivation, is deemed to be far greater than the collection difficulties of the creditor who is prohibited from taking a valid assignment of earnings. On reflection, this value judgment appears to be sound. In view of the fact that it will create very little change in Mississippi, we doubt seriously that § 2.410 will be found to be objectionable when the UCCC is offered to the Mississippi Legislature.

Conclusion

In the preceding discussion we have set forth and considered a number of the provisions of the Uniform Consumer Credit Code designed to protect the consumer. There are other UCCC consumer protection rules which have not been discussed above. Among these are the rules designed to protect the consumer against excessive delinquency charges[190] or other additional charges[191] by creditors, to restrict and control the practice of refinancing,[192] and to insure that the consumer can repay his debt at any time without penalty.[193] The UCCC also regulates balloon payments[194] and contains needed protections for the consumer signing a balloon note. Limitations on default charges[195] and attorney's fees[196] in the event of foreclosure or other default proceedings by the creditor may also be found in the UCCC. Extortionate

[188] For a summary of existing state laws dealing with wage assignments in consumer credit transactions, see B. CURRAN, *supra* note 11, at 312-22.

[189] MISS CODE ANN. § 275 (1956).

[190] UCCC §§ 2.203, 3.203.

[191] UCCC §§ 2.202, 2.204, 3.202, 3.204.

[192] UCCC §§ 2.205, 3.205. *See also* UCCC §§ 2.206, 3.206.

[193] UCCC §§ 2.209, 3.209. *See also* UCCC §§ 2.210, 3.210.

[194] UCCC §§ 2.405, 3.402.

[195] UCCC §§ 2.414, 3.405.

[196] UCCC §§ 2.413, 3.404.

extensions of credit[197] and "unconscionable" terms[198] in consumer credit transactions are proscribed. And, civil[199] and criminal[200] penalties are provided for violations of the consumer protection provisions of the Code.

In each of the instances discussed above, there exists a wide diversity of opinion as to what the proper rules should be. On almost every issue, consumers and creditors have widely divergent views. In fact, the creditors themselves are by no means united in their attitudes toward the Uniform Consumer Credit Code. We believe that the UCCC draftsmen have taken into account these differing views and have tried to strike a vital balance between the legitimate concerns of consumers and creditors.[201] This effort by the draftsmen, however, has been undertaken in the light of facts and figures compiled on a nationwide basis. Specifically, the draftsmen have carefully considered the situation with respect to consumer credit transactions in the urban centers of the nation. A question is thus raised concerning the appropriateness of enactment of the UCCC in a predominantly rural state such as Mississippi.[202]

As noted earlier in the article, many of the opinions and conclusions drawn are those of the author given without foundation in empirical data. We strongly urge that the legislature, as a part of its study of the UCCC, attempt to gather the facts to determine whether or not the basic assumptions underlying the UCCC are valid for Mississippi and will withstand the close scrutiny of an intensive investigation of consumer credit practices in this state. For example, what would be the effect in Mississippi of a repeal of the holder-in-due-course and waiver-of-defense doctrines in consumer credit sales? Will the rules on

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[197] UCCC § 5.107.

[198] UCCC § 5.108. *See also* UCCC § 4.106. For a disucssion of the concept of "unconscionability" within the context of § 2-302 of the UNIFORM COMMERCIAL CODE, see Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) and Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969).

[199] *See e.g.*, UCCC §§ 5.203, 6.113.

[200] UCCC §§ 5.301, 5.302.

[201] A quick glance at the membership of the NCCUSL Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury indicates that a highly competent and respected group handled the primary responsibility for drafting the UCCC. Further, the Advisory Committee contained representatives of a wide range of groups having an interest in consumer credit legislation. UCCC, 1969 Revised Final Draft, Prefatory Note at XXIV-XXVIII. One commentator, however, himself a member of the Special Committee, has expressed reservations about the success of consumer-creditor communications during the drafting process. Kripke, *supra* note 102, at 458.

[202] This does not appear to have bothered Utah or Oklahoma. In fact a strong argument can be made that in a state such as Mississippi, where the educational level is low and the consumers are generally unsophisticated, the protections of the UCCC are needed much more than in New York or California.

home solicitation sales and referral sales restrict legitimate business? What would be the economic effect of the ban on deficiency judgments in Mississippi, and of the UCCC rules governing garnishments and wage assignments in Mississippi? What would happen to interest rates in Mississippi if the UCCC rate ceilings became the law? Are not finance charges on some consumer credit transactions already above the 36% mark under existing Mississippi law?[203] How, if at all, would the UCCC "freedom of entry" rules in the consumer loan business really change things in this state? Do we not, for all practical purposes, have a free entry situation in this state? Do we not, for all practical purposes, have a free entry situation under present Mississippi law?[204] What has been the experience in Mississippi under the federal disclosure rules which became effective on July 1, 1969? How have Oklahoma and Utah fared under the UCCC?

The above questions, and many others, should be carefully considered, and, where possible, answered with facts and unbiased expert opinions before Mississippi enacts the UCCC. Still, we have little hesitation in concluding that existing Mississippi law governing extensions of consumer credit is out of date and inadequate. The *Austin* case[205] dramatically demonstrates that present Mississippi law is still heavily weighted in favor of creditors. In our opinion, the UCCC, if enacted, would strike a more fair and realistic balance between the legitimate interests of consumers and their creditors.

No one has yet attempted to argue that the Uniform Consumer Credit Code is perfect, or even nearly so. It seems clear that the UCCC will never enjoy the position of esteem and respect held by the Uniform Commercial Code. Still, the Uniform Consumer Credit Code, in our opinion, represents a major step in the right direction, albeit a step which no state should take in haste. On the basis of a careful consideration of the new Code, we respectfully recommend it for favorable consideration by the Mississippi Legislature.

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[203] See the maximum interest and service charges allowable under the Small Loan Regulatory Act. MISS. CODE ANN. § 5591-09 (Supp. 1968). *See also* discussion, *supra* note 46.

[204] MISS. CODE ANN. §§ 5591-35, 5591-36 (Supp. 1968).

[205] *Supra* note 111. For another creditor-oriented rule in Mississippi which appears to be firmly established, see Mullins v. Merchandise Sales Co., 192 So. 2d 704 (Miss. 1966), discussing the time-price doctrine for consumer credit sales.

LEGAL STATUS OF THE MENTALLY RETARDED AND MENTALLY ILL IN MISSISSIPPI

James W. Mann and Gene Parker***

Introduction

Mental retardation and mental illness have social implications. For this reason, society has developed a variety of special rules, considerations, and services for mentally retarded and mentally ill persons, which are embodied in the law.

Legal specialists, knowing and having access to the research tools in the field of law, can locate statutes and provisions related to mental retardation. But members of other professions, perhaps more directly involved in the problem in daily contact, do not know where to look and do not know how to interpret the technical provisions. Problems in these areas may be obscured merely by the fact that they lie between one professional field and the next. And, to date, no professional group has taken or achieved a sense of responsibility toward these areas of concern, possibly because they are not entirely in its own back yard.

The legal profession is not solely responsible for the failure of society to develop a comprehensive body of law related to mental illness and mental retardation and maintain it at a position abreast of current developments. Unfortunately, each of the professions, having developed its own methods and standards, keeps to itself, without regard to the unitary nature of the society in which all professions work and the common life to which they all contribute. The significance of the laws regarding mental illness and mental retardation must be more fully understood by the lawyers as well as by mental health and mental retardation personnel and each group should have a clear concept of the other's responsibilities.

What is needed to begin to solve the social and legal problems we face in mental illness and mental retardation in social and legal consistency. However, without a knowledge of the present state of the law in these areas, no proper recommendations can be made for change.

A. Purpose of the Study

The purpose of this study is to provide an inventory of legal provisions relating to the status of mentally ill and mentally retarded

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persons in Mississippi, for the reference use of professionals who either directly or indirectly work with the problem. Among those who may find it useful are special education personnel, psychologists and psychiatrists, social workers, attorneys, parents of children with mental and emotional problems, and all other persons who wish to know the status of the mentally ill and mentally retarded in Misissippi.

B. Scope of the Study

This study was limited to legal provisions of Mississippi and unlike other collections of legal materials on this subject, this project included provisions on topics related to mental illness and mental retardation, for all ages and for all areas of living.

The time period included was from 1850 through 1968, beginning with the earliest index to Supreme Court cases of Mississippi and ending immediately after the adjournment of the 1968 legislative session. Mississippi Supreme Court cases which have not been overruled or superceded by statutes are still available as precedents and were included. There was no attempt to provide a historical overview nor to include bills not passed by the above date.

The source materials consisted of the Mississippi statutes and supreme court decisions. Legislation below the state level is not sufficiently general for inclusion, and is not indexed. Because of the large number of state boards and departments existing in Mississippi, each with its own rules and regulations, the volume of administrative law produced by these agencies prohibited its inclusion in the project. Federal statutory and case materials were not included. This study does not recommend changes to specific provisions; however, it is the first step in improvement—the piecing together of the whole cloth of the law of mental illness and mental retardation as a base for multi-disciplinary proposals. Also, it does not attempt to estimate the extent to which these provisions are operative in practice.

C. The Search Process

The search for specific statutory provisions was made by a careful reading of the index to the Mississippi Code Annotated. References to any form of mental illness or mental retardation were noted; a list of citations related to mental illness and mental retardation (very broadly conceived) was compiled.

The annotations to the statutes provided references to additional cases and to the case digest. The cases themselves were checked for subsequent reference by the use of Shepard's Citations.

The Mississippi Legislature has not been able to provide a consistent pattern of terms referring to this area. For example, many labels

are used and Table I reflects some of the terms and phrases found in Mississippi law.

TABLE I

Some phrases in Mississippi law relating to the mentally retarded and mentally ill:

Statutes and/or Cases	Phrase
Miss. Code Ann. § 6907 (1956)	idiots
Miss. Code Ann. § 6907 (1956)	fools
Miss. Code Ann. § 6907 (1956)	incurables
Miss. Code Ann. § 6907 (1956)	those suffering from senile dementia
Miss. Code Ann. § 448 (1956)	of unsound mind
Miss. Code Ann. § 461 (1956)	imbecile and insane
Miss. Code Ann. § 2735 (1956)	incurable insanity
Miss. Code Ann. § 241 (1956)	insane person
Miss. Code Ann. Art. 4, Sec. 90 Const. (1956)	person(s) of unsound mind
Feld v. Borodofski, 87 Miss. 727 40 So. 816 (1906)	lunatic
Bryant v. Stringer, 183 So. 2d 895 (Miss. 1966)	*non compos mentis*
Woolbert v. Lee Lmbr. Co., 151 Miss. 56, 117 So. 354 (1928)	mental infirmity
Smith v. Smith, 47 Miss. 211 (1875)	deranged condition
Smith v. Smith	mental derangement
Smith v. Smith	mental distempers
Smith v. Smith	mania
Hamilton Bros. Co. v. Narciese, 172 Miss. 24, 158 So. 467 (1935)	mental incapacity

In addition to this variety of terms, there are many instances of the same term carrying different meanings. For example, contrary to the usage in education, psychology, and medicine, a mentally defective person may be feebleminded, insane, an idiot, an imbecile, a moron, a moral degenerate, or a sexual pervert. Rarely has the legislature or the Mississippi Supreme Court defined the term related to mental illness or mental retardation, and when such definitions do appear they are not sufficiently precise.

After all relevant cases and statutes were identified, it was necessary to categorize and paraphrase each provision. A large number of provisions were related to mental illness and mental retardation; however, only those statutory and case provisions directly related and pertinent to the legal status of mental retardation and mental illness were included.

Specific statutory and case findings are organized topically and the following illustrate the breadth of coverage: protection of the mentally ill and mentally retarded; property and business affairs of mentally ill and mentally retarded persons; social and civic responsibilities; domestic affairs; and sterilization.

A number of statutory provisions were excluded from the text even though they are still active, such as state appropriations for specific purposes and specific building programs authorized, as for example to renovate mental hospitals.

In addition, the areas of education and employment were referenced but not discussed.

I. Protection of the Mentally Ill and the Mentally Retarded

A. Guardianship

1. *Defined*

This section is limited to the aspects of the guardian-ward relationship as applied by our court when the ward is deemed *non compos mentis*. "A guardian, as the name implies, is a person appointed by the court to guard the interests of another person who, by reason of infancy, lunacy, or the like, is incapable of guarding his own interests without aid."[1]

The Mississippi Code defines guardian:

> Whenever the word "guardian" is used in this chapter it shall be held and construed to relate and apply to and embrace any and all persons who under the law of any other state or country stand in the relation of guardian to such non-resident idiot or lunatic or person of unsound mind, whether such person be known as curator, tutor, committee, or conservator of the property of such idiot or lunatic or other person of unsound mind, or by whatsoever name or title such person may be known.[2]

2. *Appointment of Guardian*

Where there has been a prior adjudication of insanity the chancellor or clerk[3] of the chancery court of the county residence of the NCM or the chancery court of any county wherein lies any property of the NCM[4] or the county wherein a debt is due or a right of action has accrued to an NCM has the power to appoint a guardian of the estate or person of unsound mind.[5] However, where there is no prior adjudication of

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[1] Prudential Ins. Co. v. Gleason, 185 Miss. 243, 271, 187 So. 229, 232 (1939).

[2] Miss. Code Ann. § 447 (1956).

[3] Miss. Const. art. 6, § 159. "The Chancery court shall have full jurisdiction on the following matters and cases, viz.; . . . (c) cases of idiocy, lunacy, and persons of unsound mind . . . ."

[4] This applies alike to resident and nonresident NCMs who have land in Mississippi. Miss. Code Ann. § 443 (1956).

[5] Miss. Code Ann. § 432 (1956). *Id.* § 6909-02 (1952). The same is applicable where a resident citizen of this state is confined out of state in an asylum. *See also* Swaney v. White, 230 Miss. 865, 94 So. 2d 610 (1957), wherein it was held that the chancellor of the county in which an NCM resides has jurisdiction to appoint a guardian and that a subsequent appointment of another guardian by the chancery clerk of another county is ineffective.

insanity or where it appears that the prior adjudication did not comply with the statutory requirements, a relative or any one interested in the NCM's estate or person may file a petition in chancery court of the county of residence of the NCM stating that although said NCM is not yet in need of confinement said person is of unsound mind and is incapable of caring for his person and/or estate. When this procedure is comsummated the chancellor will conduct a hearing on the subject matter notifying all interested parties, who will be permitted to testify to the subject in inquiry and if the chancellor finds that said person is of unsound mind and incapable of caring for his estate and/or person, a guardian will be appointed.[6] However, if it is found that no one qualifies as guardian the chancery clerk will assume such responsibility.[7] Furthermore, it should be noted that the nearest of kin have no absolute right to be appointed the guardian of an NCM,[8] nor can a testator name a guardian for an adult NCM[9] for the right to appoint a guardian for an NCM is conferred exclusively in the chancery court.[10] It has also been held that in cases where the NCM is mentally competent to do so, he may testify as to whom he wants as guardian.[11]

3. *Duties and Powers of Guardians*[12]

Generally, the powers of a guardian are very restrictive to the extent that he must procure court approval prior to taking action on any act of significance that affects his ward, his money, or property.[13]

He has the statutory duties of periodically making an inventory and account with the chancery court, to post bond, and take the oath to faithfully discharge his duties,[14] to provide the ward's maintenance and support, to collect, sue, and pay debts of the ward and if necessary to purchase a home, to improve the ward's estate, to provide for the maintenance and support of the ward and the ward's family.[15]

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[6] *Id.*

[7] MISS. CODE ANN. § 431 (1956).

[8] Muse v. Muse, 76 Miss. 372, 24 So. 168 (1898); Barney v. Barney, 203 Miss. 228, 33 So. 2d 823 (1948).

[9] Jones v. Parker, 216 Miss. 64, 61 So. 2d 681 (1952).

[10] Frierson v. Moorhead, 211 Miss. 811, 51 So. 2d 925 (1951), *suggestion of error overruled*, 211 Miss. 811, 52 So. 2d 833 (1951); MISS. CODE ANN. § 6909-02 (1952).

[11] Hemphill v. Smith, 128 Miss. 586, 91 So. 337 (1922).

[12] *See* MISS. CODE ANN. §§ 399 to 450-01 (Supp. 1968); *cf.* Saunders v. Mitchell 61 Miss. 321 (1883).

[13] Deposit Guar. Bank & Trust Co. v. Mangum, 172 Miss. 443, 160 So. 386 (1935).

[14] MISS. CODE ANN. § 439 (1956).

[15] MISS. CODE ANN. §§ 439, 440 (1956). As noted above, the exercise of most of these powers are subject to court appeal.

4. *Removal of a Guardian*

It would be presumptuous to assume that the following reasons are inclusive of all causes for removal of a guardian; they merely represent the causes our court has decided to date. From the nature of the question it would appear that the most frequent cause for removal is failure to sufficiently provide for the NCM.[16] It has also been held that a conviction for a felony[17] is sufficient grounds for removal. Emotional upsets caused by ill feeling and animosity between the NCM and the guardian are also sufficient grounds, even though the guardian has ably performed his duties.[18]

5. *Miscellaneous Cases on Guardianship*

In *Smith v. Muse*,[19] a guardian misinterpreted a will and held land for the ward for the statutory period disclaiming any interest in it although in reality the land was left to the guardian. Held: title was effectively vested in the ward. Equity would not relieve a party's mistake of the law pertaining to his legal rights.

The case of *Jones v. Culley*[20] is authority for the proposition that before a guardian can settle a suit out of court with a defendant, the full facts of the settlement must be disclosed to the chancellor or the chancellor must make an independent determination of the propriety of the settlement.

In *Robinson v. Burritt*,[21] a sister of an NCM seized his lands and collected the profits and rents. The NCM, via his guardian, sued out an attachment in chancery. The court held that the demand was upon a debt, not tort as a trespasser, for the chancery court will hold as bailee anyone who enters the lands of persons under a disability.

6. *Cessation of Guardianship*

It is provided by statute[22] that when the chancery court is satisfied that an NCM has been restored to sanity, his real and personal property may be returned to him, the guardian receiving such compensation as deemed reasonable by the court, and the guardianship shall cease.[23]

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[16] Watt v. Allgood, 62 Miss. 38 (1884).

[17] Hemphill v. Smith, *supra* note 11.

[18] Neville v. Kelso, 211 So. 2d 825 (Miss. 1968).

[19] 138 Miss. 518, 103 So. 356 (1925).

[20] 242 Miss. 822, 134 So. 2d 723 (1961).

[21] 66 Miss. 356, 6 So. 206 (1889).

[22] Miss. Code Ann. § 437 (1956).

[23] *See also* In re Estate of Hollingsworth, 226 Miss. 646, 85 So. 2d 185 (1956); Miss. Code Ann. § 6909-14 (1952).

Mississippi provides by statute for appointment of a guardian *ad litem* by the chancery court for persons of unsound mind when the court in its discretion deems it necessary for the "protection of the interest" of said person.[24]

B. The Commitment Process

The procedure for adjudication of insanity is presently found in §§ 6909-01[25] *et. seq.* of the Mississippi Code Annotated, 1956. The following discussion of the commitment process is a brief synopsis of its relevant provisions.

Section 6909-01 provides that this act is the exclusive authority and provides the exclusive method for the process of commitment of any lunatic, idiotic, or feebleminded[26] individual to any mental institution in the State of Mississippi, excepting commitment to the Veteran's Administration Hospital. The act is also exclusive in the area of adjudication of insanity.

The second section of this act[27] provides for the appointment of a guardian, which is discussed in the immediately preceding sub-heading of this paper.

Section three[28] details the initial step for commitment. This section prescribes that any citizen knowing of any person suffering from any mental or nervous condition who is in need of treatment, supervision, or control may file an affidavit with the chancery clerk of the county of the alleged incompetent's residence or in any county where he may be found, requesting that such person be committed to the proper mental institution. When such affidavit is filed, the chancery clerk will direct the sheriff to take custody of the alleged incompetent and in the presence of the clerk said person will be examined by two competent physicians, which physicians cannot be related to the afflicted individual or interested in his estate.[29] The mental and physical examination is required to be conducted in the court room of the county of the clerk unless the alleged incompetent is physically unable to appear. The findings of the

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[24] MISS. CODE ANN. § 1309 (1956).

[25] Baum v. Greenwald, 95 Miss. 765, 49 So. 836 (1909), held that this section gives the courts authority to confine the dangerously insane or indigent incompetents, for the protection of themselves and society.

[26] If the youth court determines that any child in inquiry is feebleminded or insane, he is to be committed to the proper mental institution, instead of being placed in a state institution for delinquent or neglected children.

[27] MISS. CODE ANN. § 6909-02 (1952).

[28] MISS. CODE ANN. § 6909-03 (1952).

[29] MISS. CODE ANN. § 6909-04 (Supp. 1968).

physicians are reported to the clerk in statutory form.[30] Any interested person has the right to present evidence and/or testimony pertaining to the mental condition of the alleged incompetent at this time.[31]

The next section[32] declares that unless both physicians find that the person is incompetent he must be discharged. If it is found that the person is incompetent but harmless and does not need confinement or treatment, the clerk is empowered to appoint a guardian for the person and/or the estate of the incompetent, and release said incompetent under the care of the guardian. However, if the incompetent is found to be in need of treatment, supervision, control, or is likely to be a threat to society the clerk will direct the sheriff to deliver the incompetent to the proper mental institution. The incompetent is again examined upon admission at the said institution and upon a finding that he is not mentally incompetent and not in need of cofinement, supervision or treatment, and is not a threat to society he will be discharged. Conversely, if the examination discloses that the individual falls within one or more of the above categories, this finding is reported to the clerk and the clerk will enter said report on the general docket and enter a final commitment order.[33] Further, if the patient is adjudicated *non compos mentis,* but is considered harmless and indigent and not in need of special treatment he will be sent to the county home for confinement.[34]

The act next enunciates the procedure by which the person adjudged incompetent or anyone on his behalf may initiate a court hearing on the order of commitment.[35] This hearing may be initiated at any time after the final adjudication by a petition in writing. After the petition is filed, the chancellor will set a date for the hearing and direct the institution to have the alleged incompetent present at the hearing. The person adjudicated or any one acting on his behalf is given the right to summon witnesses and present evidence in the hearing. If the petitioners fail in the chancery court, they are given the right by this statute[36] to appeal to the Supreme Court of Mississippi; however, it is explicitly provided that the above remedies are *not* in lieu of *habeas corpus.*

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[30] MISS. CODE ANN. § 6909-06 (1952). Further the physicians cannot be held civilly or criminally liable for such examination where they exercise due diligence and reasonable care and act in good faith.

[31] MISS. CODE ANN. § 6909-05 (1952).

[32] MISS. CODE ANN. § 6909-07 (1952).

[33] *Id.* However, the code provides no procedure in the event the individual is found to be suffering from a mental affliction but is not in need of confinement or treatment and is not likely to be a menace to society.

[34] MISS. CODE ANN. § 6911 (1952).

[35] MISS. CODE ANN. § 6909-08 (1952).

[36] *Id.*

II. Property and Business Affairs of Mentally Ill and Mentally Retarded Persons

A. Contracts

In order to facilitate a comprehensible understanding of the following section several observations should be noted at the outset, with the burden of proof fully reiterated. The law presumes that every one is sane, and it is upon the shoulders of the party seeking to avoid a contract to prove insanity. If it can be shown that the complaining party was habitually insane at any particular period or that he had been adjudicated insane prior to the execution of the contract, the presumption is that insanity continued. However, this presumption can be overcome by a showing that the insanity ceased and was superseded by a lucid interval.[37] Consequently, if insanity is shown the contract will be voidable unless the opposing party can prove that a lucid interval intervened at the time of the contract's making.

Traditionally, insane persons have been equated with infants in regards to contractual capacity[38] as well as other areas of the law.[39] Generally it is stated that the contracts made with an insane person are voidable, not void, for insane persons are without the capacity to fully comprehend the nature or terms of the proposed contract and without such comprehension there can be no consent.[40] Thus, where it appears that one of the contracting parties did not have mentality sufficient to comprehend the nature and consequences of his act, it may be avoided via insanity.[41] And this is so even though the insanity of one

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[37] *Cf.* Ricketts v. Jolliff, 62 Miss. 440, 448 (1884) wherein it is said:

> [A] lucid interval is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the party soundly to judge of the act. The evidence in support of the lucid interval, after derangement has been established, should be as strong and demonstrative of such fact as when the object of proof is to show insanity, and it ought to go to the state and habit of the person, and not to the accidental interview of any individual or to the degree of self-possession in any particular act.

[38] "Infancy and lunacy are disabilities similar in their effect on the contracts of parties and we see no good reason why a different role should be applied to the contracts of persons *non compos mentis* from that applied in the case of infants." Jackson v. Banks, 144 Miss. 392, 397, 109 So. 905 (1926); Woolbert v. Lee Lmbr. Co., 151 Miss. 56, 66, 117 So. 354, 357 (1928), where it was said: "The right of an infant to void his contract is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against a bona fide purchaser . . . ."

[39] *E.g., see* section dealing with deeds and conveyances, *infra.*

[40] Hill v. McLaurin, 28 Miss. 288 (1854). It should be remembered that this does not apply to situations where the contract was made prior to the NCM's incapacity, for in this situation an action can clearly be maintained. Hines v. Potts, 56 Miss. 346 (1879).

[41] *Id.*

party was unknown to the other, for it is held that the good faith of the sane party cannot supply the other's incapacity.[42] Although the contract of one who has not been adjudicated insane is not void, it is voidable at the option of the NCM or his representative, and the right to avoid the contract is unconditional even though the sane party entered into the agreement in all good faith and without knowledge of the incapacity. Further it should be noted that this right to avoid is not defeated even though the NCM has squandered the consideration.[43] However, this statement is qualified to the extent that the NCM or his estate must restore the consideration if he still has it. In some instances if he has realized a substantial benefit, he or his estate might be compelled to make restitution to the extent of such benefit. "[W]here an insane person disaffirms a contract entered into, he must restore the consideration received, if he still has it. But it is not a condition precedent to his disaffirming it. And, if he has squandered the consideration entirely, he can disaffirm without restoring the consideration so dissipated. If he has a part of the consideration, and it is in such form or condition that it cannot be restored to the party, equity will afford relief commensurate with the benefit so held at the time of disaffirmance."[44]

A further qualification arises in the area of necessities furnished to an NCM. Although an NCM is incapable of entering into a contract, the law will imply a contract for him,[45] and hold him or his estate liable for necessities furnished to him when said necessities are furnished in good faith and the individual furnishing the necessities is a relative.[46] Necessities have been variously defined as the wants of an insane person which are personal to mind and body,[47] necessaries suited to ones condition of life,[48] or more particularly have been held in one case to be board, nursing, clothing, care, attention, and taxes paid on the NCM's land.[49]

However, it does not follow that necessities are limited to or even include all of the elements that are traditionally thought of as necessary, such as food, clothing and shelter, for it has been held that a house is not a necessity,[50] and in view of the tests enunciated above it appears that

[42] Conn v. Boutwell, 101 Miss. 353, 58 So. 105 (1912).

[43] Woolbert v. Lee Lmbr. Co., *supra* note 38.

[44] *Id.* at 69-70, 117 So. at 359; Bell v. Smith, 155 Miss. 227, 124 So. 331 (1929), where a contract was made with an individual who was a minor and NCM.

[45] Hines v. Potts, *supra* note 40.

[46] McCully v. McCully, 175 Miss. 876, 168 So. 608 (1936); *accord,* Talbert v. Ellzey, 203 Miss. 612, 35 So. 2d 628 (1948) (Brother furnished sister, who was NCM, with necessities).

[47] *Id.*

[48] Fitzgerald v. Reed, 17 Miss. 94 (1847).

[49] McCully v. McCully, *supra* note 46.

[50] Woolbert v. Lee Lmbr. Co., *supra* note 38.

what constitutes necessities could well depend on the manner in which one is accustomed to living.

B. Deeds

1. *Avoidance of Conveyances*

It is uncontroverted that a conveyance made by an insane grantor may be rescinded.[51] The law requires that the grantor of an instrument in which land is conveyed[52] shall have sufficient mentality to understand and appreciate the nature and consequences of the conveyance and the effects upon his rights and interests.[53]

This general rule is uncomplicated on the surface, the manifest difficulty arising in application where it must be determined what *degree* of mental incapacity will avoid a conveyance. A variety of factors such as preexisting insanity, intermittent or habitual insanity, a fiduciary relationship, inadequate consideration, or undue influence may coalesce in any one case; and so no hard and fast rule may be controlling upon any given factual situation.

When a deed is contested solely on the grounds that the grantor, prior to the conveyance, demonstrated signs of temporary or intermittent mental incapacity, it is uniformly held that such temporary incapacity alone will not raise a presumption that it continued to the time of conveyance. However, if it is shown that he was habitually incapacitated prior to the conveyance a presumption will arise that he was incapable at the time to execute the instrument. When the former incapacitation is shown, the burden of going forward with the evidence is upon the party contesting the deed to show that at the time of the execution[54] that the grantor did not realize the nature and consequences of his act and its effect upon his rights and interest.[55] It appears that the question of a presumption of continuing insanity has arisen in numerous cases but in only two cases has it been sustained; both times there had been a prior adjudication of insanity.[56] Nevertheless, the above standard is misleading in light of cases which have held that the grantor was capable of executing a deed despite testimony of witnesses which verified that he

[51] Simonton v. Bacon, 49 Miss. 582 (1873).

[52] Lambert v. Powell, 199 Miss. 397, 24 So. 2d 773 (1946) (such instrument includes deeds or wills); *accord*, Conerly v. Lewis, 238 Miss. 68, 117 So. 2d 460 (1960).

[53] Puryear v. Austin, 205 Miss. 590, 39 So. 2d 257 (1949); Lambert v. Powell, *supra* note 52; Gillis v. Smith, 114 Miss. 665, 75 So. 451 (1917).

[54] Lambert v. Powell, *supra* note 52; Ward v. Ward, 203 Miss. 32, 33 So. 2d 294 (1948). The time when evidence of mental capacity attains its controlling relevancy is at the *time of the execution of the instrument.*

[55] Texaco v. Musgrove, 253 Miss. 209, 175 So. 2d 490 (1965); Young v. Martin, 239 Miss. 861, 125 So. 2d 734 (1961).

[56] Texaco v. Musgrove, *supra* note 55.

ate moldy food, did not bathe, could not carry on a connected conversation, was jittery, that he saw his dead wife in the pasture, urinated on the streets of town and in friends' homes in front of women, etc.[57] However, even if the grantor has been previously adjudicated insane and is shown to have been continuously insane the proponent of the deed may, if the situation permits, show proof of an intervening lucid interval[58] during which time the grantor is held to be as competent as any other person of his education and background, and to understand the nature and effect of his transaction.[59]

The next situation in which a deed might be set aside is where there is a weakened mind of the grantor coupled with an inadequacy of consideration. In this situation Mississippi has followed the ruling in *Allore v. Jewel*.[60] There, an heir-in-law, after a lapse of six years, sued to cancel a warranty deed that was executed by a deceased ancestor. At the time of execution the ancestor was ill and senile and the consideration was deemed unfair and inequitable. ". . .[I]t is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of the consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred."[61]

The last combination that may cause avoidance of a deed is where the grantor has a weakened mind and fraud or undue influence is coupled with a fiduciary relationship.[62] This was the situation present in *Phillips v. Ford*[63] wherein a devisee under the testator's will sought to set aside deeds executed to the defendant by the testator. The court reaffirmed the principle that evidence of undue influence, because of the very nature of the issue, cannot be affirmative and positive. Evidence to show such

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[57] Fortenberry v. Herrington, 188 Miss. 735, 196 So. 232 (1940); Conerly v. Lewis, *supra* note 52, wherein a 90 year old man, suffering from arteriosclerosis, cardiac insufficiency and other ailments that manifest themselves in advanced age, was held capable to execute a deed.

[58] Ricketts v. Jolliff, *supra* note 37.

[59] Texaco v. Musgrove, *supra* note 55.

[60] 94 U.S. 506 (1876), *quoted in* Puryear v. Austin, *supra* note 53, at 606, 39 So. 2d at 261, *and followed in* Clark v. Lopez, 75 Miss. 932, 23 So. 648 (1898).

[61] 94 U.S. at 510-11.

[62] Pipes v. Webb, 236 Miss. 612, 111 So. 2d 641 (1959). In cases involving fraud, duress, or undue influence, it is proper for the court to consider the inadequacy of consideration where there is some proof, as opposed to a mere allegation, on the subject. *Id.*

[63] 250 Miss. 425, 164 So. 2d 908 (1964); *accord*, Young v. Martin, 239 Miss. 861, 125 So. 2d 734 (1961); Curry v. Lucas, 181 Miss. 720, 180 So. 397 (1938).

a condition must of necessity be circumstantial, for one who uses such means to accomplish his ends is careful to do so only in private.

However, not every influence can be categorized as undue; to be so it must be of such nature so as to take away the free agency of the grantor. Persuasion, solicitations, or influence arising out of sympathy, kindness, affection, or gratitude for past services cannot be considered undue unless the will of the grantor is subordinated and his free agency destroyed. A man of sound mind may execute a deed for any motive satisfactory to him whether it arises out of love, whim, or caprice.[64] Where a deed is attacked on the grounds of undue influence the contestant of the deed has the burden of establishing such undue influence,[65] but where a confidential relationship exists simultaneously with any other inference of unfairness there arises a presumption that undue influence is present and the grantee must meet this presumption by evidence that the transaction was in good faith and just.[66]

In summary, undue influence may be inferred from the weakness of the mind of the grantor coupled with an inadequacy of consideration or a confidential relationship or any other inequitable circumstances.[67]

2. *The Effect of Cancellation*

Apparently our courts have treated cancellation of a deed as they have the cancellation in contract cases: upon rescission the party should be placed in *statu quo ante* as nearly as possible, and whatever benefit the NCM or his estate has received should be returned. If the consideration has been wasted or destroyed, restoration of the consideration is not a condition precedent to the rescission of the conveyance.[68]

It has been held that it is unnecessary for an NCM to go into chancery court to set aside the conveyance. He simply brings an action for ejectment for recovery of the land, for since the conveyance is voidable he can recover on the theory that he never made any legal conveyance of the property.[69]

C. Wills

> Every person aged 21 years, male or female, married or unmarried, being of *sound and disposing mind,* shall have power, by last will and testament, or codicil in writing, to devise all the estate, right, title, and interest in possession, re-

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[64] Burnett v. Smith, 93 Miss. 566, 47 So. 117 (1908).

[65] Isom v. Canedy, 128 Miss. 64, 88 So. 485 (1921).

[66] Phillips v. Ford, 250 Miss. 425, 164 So. 2d 908 (1964).

[67] *Id.*; Simonton v. Bacon, *supra* note 51.

[68] Fitzgerald v. Reed, *supra* note 48; Jackson v. Banks, 144 Miss. 392, 109 So. 905 (1926); Woolbert v. Lee Lmbr. Co., *supra* note 38.

[69] Jackson v. Banks, *supra* note 68.

version, or remainder, which he or she hath . . . .[70] (emphasis added.)

During the past three decades the Mississippi Supreme Court has progressively analogized the test in time of incapacity that may render a deed and will voidable. As early as 1946 it was held that the *time* for testing mental incapacity applied alike to deed and wills.[71] Nevertheless, at that time a different rule was enunciated for testing the requisite mental capacity needed to effectuate a will as opposed to a deed before 1961.[72] Prior to this time it was held that the test of capacity to execute a will was "the ability of the testator at the time to understand and appreciate the nature and effect of his act, the natural objects or persons to receive his bounty, and their relation to him, and [capability] of determining what disposition he desires to make of his property."[73]

The rule as to deeds was uniformly stated: ". . . whether the grantor had sufficient mental capacity to reasonably understand the nature of the transaction and its consequences and effect."[74]

Then in 1961 *Young v. Martin*[75] apparently approved the use of the identically worded test for determining mental capacity for both deeds and wills:

> The same rule for testing mental capacity applies alike to wills and deeds. Temporary or intermittent insanity or mental incapacity does not raise a presumption that such disability continued to the date of execution. It is sufficient if the testator understands and appreciates the nature of his act, the natural objects or persons of his bounty and their relation to him, and is capable of determining how he desires to devise and bequeath his property.[76]

The cases further point out the similarities between deeds and wills in reference to the burden of proof,[77] testimony of lay witnesses,[78] proof

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[70] Miss. Code Ann. § 657 (1956).

[71] Lambert v. Powell, *supra* note 52; *accord*, Johnson v. Johnson, 222 Miss. 454, 76 So. 2d 246 (1954).

[72] However, it is submitted that the import of the variously enunciated tests were essentially identical. The only difference, if any, was academic.

[73] Humes v. Krauss, 221 Miss. 301, 310, 72 So. 2d 737, 739 (1954). *See also* Conerly v. Lewis *supra* note 52.

[74] Humes v. Krauss, *supra* note 73, at 310, 72 So. 2d at 739.

[75] *Supra* note 63.

[76] *Id.* at 871-72, 125 So. 2d at 738.

[77] The party contesting the will must show mental incapacity by a preponderance of the testimony. Humes v. Krauss, *supra* note 73. For a more detailed discussion, see section on deeds, *infra*. Furthermore, it has been held that where a will has not been probated in solem form, the proponent has the burden of proof to establish validity. Curry v. Lucas, *supra* note 63.

[78] "Non-expert witnesses are permitted to give opinions in regard to mental capacity when they have stated the facts and circumstances, the acts and declarations of the

of undue influence,[79] and a will inconsistent with the testator's duties.[80] The question of the mental capacity of the testator is a question for the jury,[81] as would be expected.

III. Domestic Affairs

A. Marriage

When it appears to the circuit clerk that either applicant is insane or an imbecile, he should not issue a marriage license.[82]

B. Divorce and Annulment

Prior to 1857 Mississippi courts followed the common law rule pertaining to the validity of marriages of insane persons, i.e., marriage to an insane person was void *ab initio* on the ground that one insane could not effectively consent.[83] In 1857 the common law rule was vitiated via the statutory predecessor of § 2735 in the Mississippi Code. Since that date, insanity at the time of marriage simply rendered the marriage voidable when the party complaining did not know of the infirmity of the other party.[84]

Generally two situations arise in which a divorce is sought: a spouse seeks to divorce the other spouse, or a relative seeks to annul the marriage of his kinsman on the ground that his kinsman was insane at the time of said marriage. The latter will be considered first.

There are two leading cases enunciating the law as it stands today. In *White v. Williams*[85] Clem White died and his brother and sister filed their bill to annul the marriage of their deceased brother, alleging that the defendant spouse knew of the insanity of White and procured the marriage for the sole purpose of inheriting White's property. Furthermore there had been no consummation of the pretended marriage by a living together of the parties.

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testator, upon which they finally based the opinion expressed." Fortenberry v. Herrington, 188 Miss. 735, 747, 196 So. 232, 236 (1940); *accord*, Young v. Martin, *supra* note 63. If lay witnesses do not mention any incident, i.e., sayings or doings of the testator, to indicate that he was of unsound mind, they are not qualified to render an opinion. Johnson v. Johnson, *supra* note 71.

[79] See section on deeds, *infra*.

[80] Where it appears that a will is inconsistent with the duties of the testator in regard to his family, the proponents of the will *must* give a reasonable explanation thereof. Hutchins v. Barlow, 221 Miss. 811, 74 So. 2d 870 (1954).

[81] Fortenberry v. Herrington, *supra* note 57.

[82] Miss. Code Ann. § 461 (f) (Supp. 1968).

[83] Ward v. Dulaney, 23 Miss. 410 (1852).

[84] Smith v. Smith, 47 Miss. 211 (1872); Wilson v. Wilson, 104 Miss. 347, 61 So. 453 (1913).

[85] 159 Miss. 732, 132 So. 573 (1931).

In a harsh opinion the court proclaimed that the common law rule concerning divorce had been modified by the Code of 1857 to the effect that: (1) insanity at the time of marriage only made the marriage voidable, not void, and (2) upon the dissolution of such a marriage children of the union were not bastardized. Under their interpretation insanity could only be grounds of absolute divorce if one party were insane at the time of marriage and the complaining party was ignorant of such. Under their interpretation the purpose of the statute was to deny a divorce to one aware of the other's insanity at the time of marriage.

Thus our supreme court decided that the right to annul a marriage which was obtained via the iniquitous fraud of one party was barred by the death of the insane party. The court's rationale in reaching this inequitable result was predicated on several bases: (1) ". . . [t]hat where a statute has been construed by the Supreme Court, and afterwards re-enacted in substantially the same terms, the legislature by such re-enactment adopts such construction along with the statute";[86] (2) that the would-be heirs could have attacked the validity of the marriage while the decedent was living; (3) that to permit them to attack the marriage after the death of the decedent would open wider "the gates of fraud";[87] (4) "[t]he incentive to perjury would be great in many cases, especially where . . . the marriage had taken place against the wishes of those attacking it. It is often an elusive question whether a person is sane or insane . . . . In many cases, the testimony of the person himself, alleged to be insane, has a material bearing on the question; if his mouth is closed by death, material evidence cannot be had."[88] The court apparently realized inequities by admitting that "however it must be borne in mind that there is no such thing as a perfect system of laws."[89] Justice Griffith in a ringing dissent brought to the fore omitted facts, i.e., that it was admitted via demurrer that the defendant knew that decedent had an incurable disease (pellagra of the brain) at the time of marriage and that the decedent did not understand the nature of his act nor did he assent to the contract:

> It will thus be seen that every element which in the common understanding of all men is essential to constitute a marriage is entirely absent in this case, and in their place there exists only fraud, false conduct, and iniquity. Instead of conscious consent, or the ability physically or mentally to consent, or anything whatever that can rationally be said to be equivalent thereto, there is nothing but an empty form, a brazen counterfeit. And the fraudulent performance has no more actual va-

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[86] *Id.* at 738-39, 132 So. at 574.

[87] *Id.* at 740, 132 So. at 575.

[88] *Id.*

[89] *Id.* at 739, 132 So. at 575.

> lidity, although it pass the majority of a court, than would a counterfeit bill be anything but still a counterfeit, although it passed current for the time being in a whole community or in an entire state. Here was a pretended marriage ceremony with a lunatic, a person wholly without mind, a person who was, therefore, no more than an impotent idiot, with a pitiful creature who was nothing other than a wasted and diseased frame of bone and flesh, without human conceptions, without the physical or mental capacity present or future to consummate the relation, with a being who so far as any substance of effect was concerned may as well have been across the ocean, all at the fraudulent procurement of the other party, and with no purpose other than fraud, and yet it is said now to have all the sanctities under the law that belong to the highest conventional estate known to civilized society. Under the holding of the court here, if two lunatics, utterly insane, confined in an asylum, but being harmless, are at certain hours allowed the privileges of the grounds, should contrive to go through a marriage ceremony under the forms of law, although never for a moment actually consummated, they would be husband and wife with all the legal obligations imposed by law upon a husband, and if either should die before decree of annulment, then the void ceremony would become invested with all the finality of absolute validity. And if one of these should recover his or her sanity, and having no mind or memory respecting the previous marriage ceremony, and no other person remembering it, should on being released from the asylum, marry again and rear a large family and with the aid of spouse and children accumulate a comfortable estate, and should die while the first or lunatic spouse yet lives, then the second marriage would be bigamous and void, the children bastards and their estate swept away.[90]

Justice Griffith further demonstrated the basic fallacy of the majority's reliance on their cited precedence. The cases cited in the majority opinion all concerned divorce but the principal case concerned an annulment. As Griffith pointed out, *Ellis* (upon which the majority rested their decision) was decided on the erroneous presumption that an annulment could not be granted unless the ground for said annulment is found in divorce statutes. This view is unsound, for as he analogized, nowhere in the divorce statutes is duress a ground for divorce "yet duress as a cause for annulment of marriage has been recognized without question throughout the history of this state and is expressly upheld in *Marsh v. Whittington*, 88 Miss. 400, 40 So. 326 . . . ."[91]

It was also distinctly pointed out in *Antoine v. Antoine*[92] that the statutes on divorce do not refer to annulment suits. It has also been

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[90] *Id.* at 742-44, 132 So. at 576.

[91] *Id.* at 745, 132 So. at 577.

[92] 132 Miss. 442, 96 So. 305 (1923).

held[93] that the marriage contract requires assent of both parties. After citing many authorities in the history of annulment and divorce, Griffith pointed out that divorce statutes are not controlling or exclusive in annulment proceedings; also, he quoted sound authorities to the effect that the marriage of an insane person was void, whether the question arises during the lifetime of both parties or after the death of either of them, for want of consent.

Griffith also argued that the Mississippi statute dealt only with the same party's right to complain. That is, as to the insane party the statute is silent and being silent it therefore makes no change in the common law, and that law is that so far as the insane party is concerned the marriage is void. He further argued that the statutes should not be construed so as to abrogate the maxim that no one should gain a right by his own wrong. Griffith further contended that marriage without the consent of the parties has always been odious to the free people of this country and cited 1 BISHOP § 94 to the effect that "we have already seen that consent is the essence of marriage without which it cannot exist."

1. *Divorce During a NCM's Lifetime*

Before delving into this topic it is appropriate to reiterate several basic postulates. All persons of competent age are presumed to have sufficient mentality to enter into a contract of marriage, but if complete and permanent insanity is proven to exist before the time of marriage by evidence of prior judicial adjudication, the presumption is that insanity continued; however, this presumption may be rebutted by proof that the insane condition had been succeeded by a lucid interval.[94]

Furthermore, when an individual does not possess the capacity to comprehend the subject, duties, and responsibilities of the marriage relationship, the marriage may be annulled for lack of sufficient mentality during the lifetime of both parties.[95]

Parkinson v. Mills,[96] apparently a case of first and last impression, involved a situation in which the guardian of an NCM sought to have the ward's marriage annulled on the grounds that it was fraudulently procured in an effort to attain an interest in the NCM's estate. The NCM had been previously adjudicated insane and was a patient in the Veteran's Hospital in Biloxi when the two parties were "married." Testimony received at trial disclosed that the NCM was not at the time and

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[93] Main v. Main, 113 Miss. 165, 74 So. 138 (1917).

[94] Smith v. Smith, *supra* note 84.

[95] Ward v. Dulaney, *supra* note 83; Parkinson v. Mills, 172 Miss. 784, 159 So. 651 (1935).

[96] Parkinson v. Mills, *supra* note 95.

never could be mentally capable of understanding the import of a marital contract.

After holding that the marriage was null, the court stated that under the facts of this case the divorce statute was not applicable because the statute was designed to permit a divorce to the *same* party after marriage to a NCM when the former did not know of the latter's insanity at the time of the marriage. Secondly, the statute was designed to prevent the bastardization of issue.

Then the court stated that the common law remedy is still available to a party situated as *Parkinson* was here. However, this statement completely disregarded that at common law the marriage of an NCM was void. In further avoiding the common law and well established principles of Anglo-Saxon jurisprudence the court stated in *Ervin v. Bass* that "a marriage, the consent to which has been induced by force or coercion, is not void, but voidable. In consequence it remains of full legal effect and valid for all purposes until dissolved by the decree of a competent court; and such decree cannot be rendered except during the lifetime of the parties."[97]

2. *Spouse v. Spouse*

In this instance one party seeks a divorce from the other on the ground that the other party was insane before and/or at the time of the marriage, such condition being unknown to the complaining spouse until after the marriage. Thus, in order to succeed, the complaining spouse must prove by a preponderance of the evidence that (1) the other spouse was insane at the time of the marriage and (2) that this fact was unknown to him.[98]

It should be noted that in order for insanity to be sufficient to sustain a divorce under the preceding context, the insanity must be permanent and continuous. It has been held that intermittent spells of insanity and lucid intervals before marriage, coupled with permanent insanity several years afterwards with evidence of a hereditary trait in the family, is not sufficient to warrant a divorce.[99] Further, acts of cruelty or inhuman treatment committed by an insane person are not grounds for divorce for such person is held incapable of willful or deliberate conduct and the statute allowing divorce for cruel and inhuman treatment presupposes that such acts are intentional.[100]

After the insanity of the other party is discovered there is a further duty on the complaining party to choose his course of action in a rea-

[97] 172 Miss. 332, 336, 160 So. 568, 569 (1935).
[98] Smith v. Smith, *supra* note 84.
[99] *Id.*
[100] McIntosh v. McIntosh, 151 Miss. 78, 117 So. 352 (1928).

sonable time, i.e., he must within a reasonable time file for divorce or it will be presumed that he elected to treat the marriage as valid.

> The law will not permit the complaintant, . . . after discovering insanity, to go ahead and treat the marriage as binding so long as suited his interest or convenience, and then to repudiate it when he ceases to be satisfied with the relation. The law requires the party injured, under such circumstances, promptly to elect whether he will abide by the relation, or whether he will disavow and dissolve it, or obtain a divorce.[101]

Since *Parkinson* our legislature has enacted an annulment statute,[102] the import of which is not yet known since there are no reported cases to date dealing with the new legislation. Subsection (b) of the statute explicitly states that if the guardian or next friend of an NCM desires to annul the NCM's marriage, suit must be brought within six months. However, the question as to whether this section vitiates the right of the NCM to annul the marriage if he should be restored to his reason *after* six months has elapsed, presents an issue not so explicit. Although there is dispute among the legal profession as to the exact import of this statute, it is submitted that subsection (d) reserves the right to the NCM who regains his sanity, to have any marriage, which was consummated while he was under such a disability, annulled. Subsection (d) provides that an annulment suit by one who was "incapable from want of age or understanding, of consenting to any marrage" at the time of the marriage may be brought within six months after the disability is or should be discovered. It is submitted that, "want of . . . understanding" applies to mental incapacity in any form or degree.

However, should subsection (d) be construed to apply only to those persons whose mentality falls short of "insanity," it could be argued that this statute is in derogation of common law and should be strictly construed. Thus subsection (b) is limited to a cause of action by the guardian or next friend and in no way affects the "insane party's" right to bring an annulment proceeding *after* his disability is removed.

IV. Social, Civic and Legal Responsibilities and Liabilities

A. Criminal Responsibility

The right of the sovereign to execute one who is insane has always been denied at least since the repeal of the Statute,

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[101] *Id.* at 81, 117 So. at 352.

[102] Miss. Code Ann. § 2748-02 (Supp. 1968). "A marriage may be annulled for any of the following causes existing at the time of the marriage ceremony, to wit:

. . . .

(b) Insanity or idiocy of either or both parties. Action of an insane spouse may be brought by guardian or in the absence thereof by a next friend, provided suit be brought within six (6) months after the marriage."

> 33 Henry VIII, c. 20. The present humane view is thus expressed by Blackstone: "if a man in his sound memory commits a capital offence and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."[103]

In the well contested arena of criminal responsibility there are basically three instances when the question of mental capacity or want of capacity arises: (1) mental incapacity at the time of trial, hereinafter referred to as present insanity, (2) mental incapacity at the time of the alleged offense, and (3) mental incapacity arising after conviction, but prior to execution of judgment. Since the standard for testing mental capacity and the basic rationale in these three areas differ they will be considered independently.

1. *Present Insanity*

The Supreme Court of Mississippi has consistently held that one who is mentally incapacitated cannot be tried for any criminal offense if such disability prevents him from making a rational defense,[104] and in order to make a rational defense it has been held that the defendant should be able to remember and intelligently relate the events surrounding the crime[105] and to assist his attorney in conducting his defense, and if need be able to testify in his own behalf.[106] Upon learning of his clients mental incapacity the attorney files a suggestion of insanity alleging that the defendant is incapable of assisting him in conducting a rational defense. This motion may be oral[107] or written[108] but *must* be accompanied either by affidavit,[109] certificate[110] or wit-

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[103] COOLEY ON BLACKSTONE, *quoted in* Musslewhite v. State, 215 Miss. 363, 367, 60 So. 2d 807, 809 (1952).

[104] Pace v. State, 218 Miss. 614, 67 So. 2d 521 (1953); Shipp v. State, 215 Miss. 541, 61 So. 2d 329 (1952); Hawie v. State, 121 Miss. 197, 83 So. 158 (1919).

[105] Shipp v. State, *supra* note 104.

[106] McGinnis v. State, 241 Miss. 883, 133 So. 2d 399 (1961). *See also* Jaquith v. Beckwith, 248 Miss. 491, 157 So. 2d 403 (1963); Eastland v. State, 223 Miss. 195, 78 So. 2d 127 (1955).

[107] Hawie v. State, *supra* note 104.

[108] Pace v. State, *supra* note 104; Carter v. State, 199 Miss. 871, 25 So. 2d 470 (1946).

[109] McGinnis v. State, *supra* note 106. Even the affidavit of the defendant's attorney was held sufficient to make a prima facie showing that the defendant was incapable of conducting a rational defense.

[110] Pace v. State, *supra* note 104.

nesses[111] which show that the defendant is insane or incapable of conducting a rational defense.

If the testimony of witnesses or affidavits is sufficient to establish a "reasonable probability" that the defendant is incapable of fashioning a rational defense, the trial judge *must* submit the issue preliminarily to a jury,[112] for even though the trial judge has reasonable discretion in determining this issue[113] an abuse of discretion by refusing to preliminarily try the issue of insanity is reversible error.[114] As held in *Olsen v. State*,[115] if the state offers no evidence to rebut the testimony of only *one* witness for the defendant who testifies that the defendant was presently insane, the denial of a preliminary hearing is error even though the trial judge has discretion in this matter. Upon such a finding of "reasonable probability" the trial judge by statute[116] has authority to appoint a psychiatrist to examine the defendant whose expertise and testimony is to aid the jury in making a decision.[117] Thus, a finding of "reasonable probability" makes mandatory the submission of the question of present insanity to a jury in a preliminary hearing.[118]

The reason for the use of the preliminary hearing is based on the sound rationale that the defendant is "entitled to have a jury pass on this important issue not unduly influenced by the prejudicial testimony that may be developed upon the trial of the issue of his guilt or innocence of the crime charged."[119]

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[111] Davis v. State, 151 Miss. 883, 119 So. 805 (1929). The affidavits are essential because a mere motion by the defendant's attorney is insufficient grounds for a preliminary hearing. *See also*, Skinner v. State, 198 Miss. 505, 23 So. 2d 501 (1945). Furthermore, it appears that, in the affidavits, the witness must set forth the acts, conduct or circumstance of the defendant upon which the proponent bases his opinion, *i.e.* the affiidavit cannot merely state the conclusion that the defendant is presently insane. Wheeler v. State, 219 Miss. 129, 63 So. 2d 517 (1953).

[112] McGinnis v. State, *supra* note 106; Eslick v. State, 238 Miss. 666, 119 So. 2d 355 (1960); Robinson v. State, 223 Miss. 70, 77 So. 2d 265 (1955); Shipp v. State, *supra* note 104; Williams v. State, 205 Miss. 515, 39 So. 2d 3 (1949).

[113] Robinson v. State, *supra* note 112.

[114] Shipp v. State, *supra* note 104.

[115] Olsen v. State, 224 Miss. 226, 79 So. 2d 841 (1955).

[116] Miss. Code Ann. § 2575.5 (Supp. 1968).

[117] Apparently the role of the psychiatrist is limited to an effort in aiding the jury's decision, and not the dual role of aiding the judge and the jury, for it was held in Jaquith v. Beckwith, *supra* note 106, that before a psychiatric examination can be ordered there must be a reasonable probability of defendant's insanity and that if there is such a reasonable probability the issue of sanity must preliminarily be submitted to the jury.

[118] However, *see* Eslick v. State, *supra* note 112, where a motion for a change of venue was granted at the time the defendant was undergoing a psychiatric examination and when defense counsel did not raise the issue of present insanity again at the time of trial, it was held that the preliminary hearing was deemed waived.

[119] Pace v. State, *supra* note 104.

Thus, if in the trial judge's discretion a reasonable probability of insanity is shown, the issue will be presented in a preliminary hearing to a jury who will finally determine the issue. If the jury finds present insanity the defendant will not be tried but will be remanded to the custody of the chancery court, which will commit him to an asylum for treatment and confinement until his sanity is regained, at which time he will be returned to the custody of the court for a trial on the merits.[120] However, if the trial judge or jury should not find a "reasonable probability" of insanity, the case will proceed to a trial on the merits.

2. *Incapacity at the Time of Offense*

The statutes[121] and court decisions[122] of our state are committed to the principle that an incompetent person[123] cannot be convicted of a criminal act. This rationale is premised on the basic assumption that *mens rea*, i.e., criminal intent, is an essential element of criminal conduct in that the insanity of the defendant at the time of the commission of the act vitiates such criminal intent.

a. *The Responsibility Test*

The test for determining criminal responsibility at the time of the alleged offense is completely different from that of capacity to stand trial. In this area, capacity at the time of the event, our court follows the common law rule founded on the famous *Daniel M'Naghten* case[124] which simply requires that the defendant possess the ability to distinguish between right and wrong at the time of the commission of the offense. In *Cunningham v. State*,[125] one of the earliest reported decisions in point, our court used the test that is followed today:[126] "When we speak of insanity as an excuse for crime, we refer, of course, to such degree of insanity as disqualifies from a proper perception of the dif-

[120] It should be noted that ordinarily, the time spent in the asylum is not usually credited to the defendant if he is subsequently found sane, guilty on the merits, and sentenced to a term of years in prison.

[121] MISS. CODE ANN. § 2575 (1956) provides for acquittal of persons who were insane at the time of the offense. *See also* MISS. CODE ANN. §§ 2573, 2574 (1956) which provide respectively that if any conservator of the peace or the grand jury finds that any person brought before them charged with a crime is insane said prisoner should be placed in custody of the chancery court for further proceedings.

[122] Buckler v. State, 173 Miss. 350, 161 So. 683 (1935); Hawie v. Hawie, 128 Miss. 473, 91 So. 131 (1922); Hawie v. State, *supra* note 104.

[123] One who is incapable of distinguishing right from wrong.

[124] 10 Clark & F. 200 (Eng. 1843).

[125] 56 Miss. 269 (1879).

[126] However, there was a 3 year period (1928-1931) in which insanity was not considered a defense to a criminal action, but in 1931 Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931), held this theory and corresponding statute to be unconstitutional.

fence between right and wrong, and thereby shields its victims from legal accountability for his acts."[127] Although this test has been variously stated[128] the import of it is the same—the capacity to distinguish right from wrong. The Mississippi Supreme Court has never defined the term "wrong," although the court has approved jury instructions using the term "moral wrong."[129] It is submitted that the word "wrong" has moral connotations, but for there to be *legal* responsibility for an act that is "wrong" the word must be used in the legal context, for many acts are "morally wrong" but carry no legal implication.

Insanity need not be habitual to absolve the actor of criminal responsibility. It may be temporary in nature,[130] for the crucial time for testing criminal accountability is the time of the particular act in question.[131] Thus, one could be sane as to other subjects, but if he is incapable of distinguishing right from wrong as to the act committed, no responsibility can attach,[132] but conversely it is "not necessary for the state to prove that the defendant was wholly sane at the time of the act but only that he was mentally capable of and appreciating the nature of his act and of distinguishing between right and wrong."[133]

b. *Burden of Proof*

In proving its case the burden of proof[134] is upon the state to show every essential element of the crime, and as guilt depends on the defendant's sanity, sanity must be shown to the same extent as any other element of the crime[135] for "there is no guilt without sanity."[136]

> There can be no crime without mental accountability, and it is just as essential to show the conscious mind as the unlawful act.[137]

However, since the state is armed with the presumption that all

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[127] Cunningham v. State, 56 Miss. 269, 276 (1879).

[128] "[T]he test of criminal responsibility is the abiltiy of the accused, at the time he committed the act, to realize and appreciate the nature and quality thereof—his ability to distinguish right and wrong." Rogers v. State, 222 Miss. 690, 698, 76 So. 2d 831, 834 (1955), *quoting* Eastman v. State, 169 Miss. 295, 299, 153 So. 381 (1934).

[129] Rogers v. State, *supra* note 128.

[130] Ford v. State, 73 Miss. 734, 19 So. 665 (1896).

[131] Rogers v. State, *supra* note 128.

[132] Grissom v. State, 62 Miss. 167 (1884).

[133] Keeler v. State, 226 Miss. 199, 84 So. 2d 153 (1955). *See also* Bovard v. State, 30 Miss. 600 (1856).

[134] The burden of proof never shifts in a criminal case; however, the presumption of general sanity will sustain the state's case if the defendant offers no proof to raise a reasonable doubt of his sanity, Williams v. State, *supra* note 112.

[135] Cunningham v. State, *supra* note 127.

[136] *Id.* at 275.

[137] *Id.*

men are sane,[138] the duty to offer evidence which suggests a doubt of defendant's insanity devolves primarily upon the defense. But once the proof warrants a reasonable doubt of insanity no matter from which side doubt comes,[139] the state is burdened with proving defendant's insanity "beyond all reasonable doubt."[140] The showing of habitual insanity will raise a presumption that said state of mind continued, and the state must prove that the act was committed during a lucid interval.[141] Proof of temporary insanity, however, will not raise the presumption of continuing insanity, thus the state may rely on the presumption of general sanity without offering proof of a lucid interval.[142]

Waycaster v. State[143] demonstrated that when the defense of insanity is raised the courts will be very liberal in allowing the introduction of any and all evidence which tends to show the sanity or insanity of the accused, and every act of the party's life is relevant to the issue of sanity and admissible into evidence.[144]

The evidence of insanity may be obtained from a variety of sources, including the demeanor of the defendant in the court room,[145] previous physical injuries,[146] letters written by the defendant,[147] and prior adjudication of insanity.[148] The most useful and apparently the most effective evidence of insanity seems to be opinion and observation of expert or lay witnesses.

It is uncontroverted that laymen are qualified to express their opinion as to the sanity of a defendant, but for such evidence to be admissible it must be accompanied by a statement of the facts upon which the lay witnesses base their opinion and it should be shown that the witnesses had sufficient opportunity to observe the defendant.[149] However, a jury determines the weight that should be given the testi-

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[138] In Ford v. State, *supra* note 130, this presumption was held to be sufficient to sustain the state's case if the defendant offers no evidence to raise a reasonable doubt as to his sanity at the time of the act.

[139] Cunningham v. State, *supra* note 127.

[140] *Id.*; Jackson v. State, 249 Miss. 202, 161 So. 2d 660 (1964); Anderson v. State, 246 Miss. 821, 152 So. 2d 702 (1963); Ford v. State, *supra* note 130.

[141] Ford v. State, *supra* note 130.

[142] *Id.*

[143] 185 Miss. 25, 187 So. 205 (1939).

[144] McGarrh v. State, 249 Miss. 247, 148 So. 2d 494 (1963); Wilson v. State, 243 Miss. 859, 140 So. 2d 275 (1962); Smith v. State, 95 Miss. 786, 49 So. 945 (1909).

[145] Carter v. State, *supra* note 108.

[146] Cates v. State, 171 Miss. 106, 157 So. 95 (1934).

[147] Gambrell v. State, 238 Miss. 892, 120 So. 2d 758 (1960).

[148] Ford v. State, *supra* note 130. However, in Singleton v. State, 71 Miss. 782, 16 So. 295 (1894), the enormity of the crime will not raise a presumption of insanity.

[149] McGarrh v. State, *supra* note 144.

mony of all witnesses and such weight should be based on the intelligence and opportunities of observations of the witness.[150] Thus, it has been said that the testimony of an intelligent friend who had occasion to observe defendant frequently over a period of years might be given more weight than that of the most experienced expert with limited observation, especially if observation occurred after the act in question.[151]

As already mentioned, our legislature has provided a means[152] for the court to appoint a competent psychiatrist to examine the defendant and testify as to his sanity. The usual manner by which this is done is demonstrated in *Wilson v. State*.[153] The psychiatrist is appointed by the court to examine and observe the defendant and he hears all relevant testimony during the hearing. Then he is asked a hypothetical question in which counsel puts forth the substance of all the testimony as to the life and conduct of the defendant and inquires of the psychiatrist whether in the psychiatrist's opinion the "hypothetical" individual knew the difference between right and wrong at the time of the act. It has been held that the expert can state his opinion when the above predicate is properly laid.

3. *Insanity Occurring After Conviction*

Insanity arising subsequent to a conviction has the effect of staying execution of judgment[154] or sentencing,[155] whichever the case may be, until such time that the defendant regains his sanity. It is well settled that a convict cannot be punished or executed while he is insane,[156] for the law presumes that had he been *compos mentis* he might have alleged something that would have stayed judgment or execution.[157] A method[158] of staying execution of judgment is by use of a writ of

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[150] *Id.*

[151] *Id.*

[152] Miss. Code Ann. § 2575.5 (Supp. 1968).

[153] 243 Miss. 859, 140 So. 2d 275 (1962).

[154] Miss. Code Ann. § 2558 (1956) provides that if it is discovered that one awaiting execution is insane, execution shall be stayed and the convict shall be delivered to the state insane asylum where he will remain until such time that it is certified that his sanity has been regained. Upon such certification the convict shall be returned to the sheriff for execution of judgment.

[155] Lang v. State, 238 Miss. 677, 119 So. 2d 608 (1960), where the defendant after conviction and sentencing was found insane, the circuit court set aside the sentence but not the conviction and the supreme court refused appeal since the order was not final.

[156] Shipp v. State, *supra* note 104; Musslewhite v. State, 215 Miss. 363, 60 So. 2d 807 (1952).

[157] Musselwhite v. State, *supra* note 156.

[158] For methods other than the statutory one see Lewis v. State, 155 Miss. 810, 125 So. 419 (1929); Jaquith v. Beckwith, *supra* note 106.

error *coram nobis*.[159] The writ is directed to the judge before whom the defendant was tried requesting inquiry into said defendant's mental capacity. The writ must be accompanied by sworn affidavits which allege that the defendant's insanity has arisen subsequent to conviction.[160] If the writ is supported by ample evidence, a stay of execution is issued and remains in effect until the defendant is adjudicated sane.[161] If the writ is requested after affirmance of guilt by the Mississippi Supreme Court, the writ should be directed to the supreme court, and before the supreme court will authorize the petitioner to present the writ to the circuit judge the defendant "must establish that there is a reasonable probability the applicant is insane and that his execution should be stayed."[162] It should be noted that *coram nobis* is not available to review the sanity of the defendant at the time of the trial or at the time of the commission of the offense for these questions are *res judicata*.[163]

In investigating whether the defendant is insane subsequent to conviction the *cause* of insanity is immaterial.[164]

Under Mississippi Supreme Court decisions[165] and § 2575 of the Mississippi Code, the jury has three possible verdicts to render in a case involving an NCM: (1) They can pronounce him guilty, which presupposes that he is sane. (2) They can determine that he is innocent of the crime charged or not guilty. (3) They can find him not guilty because of insanity. The last verdict *must* be accompanied by a finding as to whether the defendant is still insane and whether he is dangerous to the community. If he is found insane and dangerous, he will be confined in the state asylum; if not, he will be released.[166]

B. Jury Duty and Voting

Although the pertinent section of the Mississippi Code[167] does not explicitly disqualify insane persons from jury duty, the same result is reached indirectly via § 1766,[168] wherein it is stated that the jurors are to be procured by the Board of Supervisors from the registration book

[159] Wheeler v. State, 219 Miss. 129, 63 So. 2d 517 (1953); Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937).

[160] Lewis v. State, *supra* note 158.

[161] Refusal of circuit judge to issue the writ is not appealable. Carraway v. State, 163 Miss. 639, 141 So. 342 (1932).

[162] Wheeler v. State, *supra* note 159, at 156.

[163] Mitchell v. State, *supra* note 159.

[164] See Musselwhite v. State, *supra* note 156, where there was a divergence of opinion by experts as to whether the defendant's insanity was caused by fear of execution.

[165] *Cf.* Rogers v. State, *supra* note 128.

[166] MISS. CODE ANN. § 2575 (1956).

[167] MISS. CODE ANN. § 1762 (1956).

[168] MISS. CODE ANN. § 1766 (Supp. 1968).

of voters from such qualified persons of good intelligence, sound judgment and fair character. However NCMs are explicitly disqualified from *voting* by the Mississippi Constitution[169] and by statute.[170]

C. Liability

1. *The NCM's Liability*

Persons *non compos mentis* are classicly equated with infants and held civilly liable for their torts except for those torts in which malice and intention are necessary ingredients.[171] They are held to exercise the same degree of care as a reasonable and prudent man would under the same or similar circumstances. For example, NCMs have been held civilly liable in tort actions for assault and battery, trespass, property destruction, false imprisonment, injury sustained by third persons arising out of the defective condition of property, and wrongful death and destruction of others' property. Generally, an NCM will not be civilly liable for torts that require a showing of malicious intent, such as deceit or defamation.[172]

The Mississippi Supreme Court followed the majority in the opinion of *Field v. Borodofski*,[173] an assault and battery case. Through Justice Calhoun the court held that it was "[w]ell settled . . . that he [a lunatic] is liable for compensatory damages for injuries he inflicts on the person or on property."[174] It seems as equally settled that he "is not liable at all criminally, nor for punitory damages in civil actions."[175]

Although the court talks of intent—that NCMs are not liable for torts where malice or intent is a prerequisite to the act—that is not to say, as the language seemingly connotates, that they are not civilly liable for all torts in which intent is usually considered a prerequisite. Intent used alone is a misnomer, for intent is a necessary element in a civil action seeking compensation for assault. Intent, as used here, means evil or malicious intent, for the NCM actually intends to commit the act, yet his act is not maliciously premeditated or maliciously intended, simply because he is considered incapable of evil intent.

Even though the courts pay lip service to this concept of intent, in practice recovery by one wronged by a NCM is based almost entirely on different principles. This is shown in the opinion of *Field v. Boro-*

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[169] MISS. CONST. art. 12, § 241.

[170] MISS. CODE ANN. § 3130 (1956); *Id.* § 3235 (Supp. 1968).

[171] 44 C.J.S. *Insane Persons* § 122 (1945).

[172] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 1028 (3d ed. 1964).

[173] 87 Miss. 727, 40 So. 816 (1906).

[174] *Id.* at 731, 40 So. at 816.

[175] *Id.*

dofski, where the court said, "The injury is the thing, regardless of intent—or malice which is involved in intent."[176] Thus, recovery is based primarily on public policy: (1) if an insane person is not held liable for his tort those interested in his estate might not sufficiently care for him so as to deprive him of the opportunity to inflict injury to another; (2) to deny recovery to one injured by an insane person is more unjust than calling upon the latter's estate to pay for the injury; (3) if insane persons were not held liable for their torts, other persons would be tempted to simulate insanity to avoid suit; (4) where one of two innocent parties should bear loss, the loss should fall on the one whose act caused the loss; and (5) holding NCMs liable for their torts tends to secure a more efficient custody and guardianship of their persons.[177]

The question as to what extent an NCM is held liable for his tortious conduct appears to be one area of the law that is well settled for the present and for the immediate future. The reason is simple. Public policy demands that the insane must pay for the damage they do to persons or property, even though in the majority of the cases they know not the nature of their acts. Thus, wherever you turn, the opinions of the courts echo the fact that an insane person is responsible for his torts as a sane person except for those where malice or intent is a necessary element.[178]

The only exception is found in Louisiana which has enunciated a contrary rule. This is explained by the fact that Louisiana adopted a civil law as found in France, whereas the other forty-nine states have adopted the common law of England. As expounded in *Yancey v. Maestri*,[179] under the civil law of Louisiana an insane person or his estate cannot be held liable in damages for his tortious acts.

2. *Liabilities of Others for the Torts of Mentally Retarded Persons*

Subsidiary but relevant to the inquiry of a NCM's liability in tort for his personal acts is a problem of the liability of others, whether they be custodians or mental hospitals, or others, for the torts of the mentally disordered person. Unfortunately (maybe fortunately) the Mississippi Supreme Court has not had the opportunity to render its opinion on a case concerning this particular point. A review of how

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[176] *Id.* at 732, 40 So. at 816.

[177] Annot., 77 A.L.R.2d 628 (1961).

[178] Ragan v. Cox, 210 Ark. 152, 194 S.W.2d 681 (1946); Johnson v. Lambotte, 363 P.2d 165 (Colo. 1961); Young v. Young, 141 Ky. 76, 132 S.W. 155 (1910).

[179] 155 So. 509 (La. App. 1934).

the issue has been resolved in other jurisdictions will give us some insight into the problem.

The standard for determining liability is based on an objective principle: whether or not the one charged with the custody of the NCM exercised reasonable care to restrain and guard him as would seem sufficient to an ordinary prudent man under similar circumstances to prevent escape and/or infliction of injuries to others.[180] Also, the degree of care apparently increases proportionately with the degree of mental or physical ailments of the patient.[181]

Further complicating this standard used in finding liability is the element of foreseeability. On this issue most jurisdictions hold that a NCM's custodian is not liable for torts of the NCM which the custodian could not reasonably anticipate. A substantial number of jurisdictions, however, hold the custodian liable if he simply fails to exercise care in restraining the NCM as a reasonable and prudent man would under like or similar circumstances.[182] The latter proposition, simply stated, would be that if a custodian were negligent in permitting the NCM to escape, then the former would be liable for damages inflicted by the latter on another that were proximately caused by the custodian's negligence, regardless of the patient's history.

D. Capacity As a Witness

The common law rule that an insane person was incompetent to serve as a witness has been abolished in Mississippi. The present test of competency is to the effect that an insane person "is competent [to testify] as a witness if at the time he is offered as a witness he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen and heard in reference to the questions and issue,"[183] and this rule has been liberally construed.[184]

The rationale of this rule is not readily apparent because of apparent susceptibility of abuse in allowing testimony of a NCM who

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[180] Dahlberg v. Jones, 232 Wis. 6, 285 N.W. 841 (1939).

[181] Weihs v. State, 267 App. Div. 233, 45 N.Y.S.2d 542 (1943). *Cf.* Excelsior Ins. Co. of N.Y. v. State, 296 N.Y. 40, 69 N.E.2d 553 (1946) where the state was held not liable for damage resulting from an escaped inmate's burning of plaintiff's barn because from the patient's history of harmless escapes the school authorities could not have reasonably anticipated that said inmate would set fires.

[182] Campbell v. Glenwood Hills Hosp., Inc., 273 Minn. 525, 142 N.W.2d 255 (1966).

[183] Butler v. State, 217 Miss. 40, 51, 63 So. 2d 779, 781 (1953).

[184] *Cf.* Hunter v. State, 137 Miss. 276, 102 So. 282 (1924), wherein a witness of approximately 17 years of age who did not know what state and country he lived in, how many months there were in a year, when Christmas came or what it signified, etc., was held competent to testify upon a trial for murder.

could mislead the trier of fact. In practice the rule is very realistic, however, in that it recognizes that although a person may be classified as insane, such fact might not render ineffective his ability to accurately communicate his observations and to relate the truth.

The rationale is also buttressed by the safeguards that prevent inaccurate and prejudical testimony from being heard by the trier of fact. The adverse party has a right, guaranteed by the due process clause in both state and federal constitutions, to have a preliminary hearing of the jury, and the trial judge—through his expertise and experience—determines if a witness should be heard. This hearing must be had at the time the witness is offered, for it is not sufficient that the witness was found competent to testify in another cause even if there has been only a short lapse of time and the witness was before the same judge.[185] "The witness may have been *compos mentis* on one day and a lunatic on another."[186]

A further safeguard is the fact that although a trial judge may permit the jury to hear the testimony of the witness, the jury assesses the credibility, weight, and value to be given his testimony.[187]

Thus, it appears to be the established rule in this state that an NCM may or may not be a competent witness, depending upon whether he satisfies the trial judge that he understands the obligation to tell the truth, and whether he is capable of accurately relating his observations in reference to the facts at issue.

E. Sexual Sterilization

The procedure for the sexual sterilization[188] of individuals determined to be *non compos mentis* can be initiated by the superintendent of either the Mississippi State Mental Hospital, the East Mississippi Mental Hospital or the Mississippi School and Hospital for the Mentally Retarded. When the respective superintendent is satisfied that sterilization of any inmate would promote the best interests of the other patients and of society, the superintendent will present a petition with an accompanying affidavit to the board of trustees of his institution stating the facts and the grounds of his opinion, requesting that the board issue an order requiring him to have said patient sterilized.[189]

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[185] *Id.* However this right can be waived if there is no timely motion for a preliminary hearing on competency. *See also* Fairley v. State, 52 Miss. 656, 120 So. 747 (1929).

[186] White v. State, 52 Miss. 216, 223 (1876); *accord* Butler v. State, 217 Miss. 40, 63 So. 2d 779 (1953).

[187] Butler v. State, *supra* note 186.

[188] MISS. CODE ANN. §§ 6957 *et seq.* (1952).

[189] MISS. CODE ANN. § 6958 (1952).

Thirty days prior to the presentation of the petition to the board, copies of the superintendent's petition and notice designating time and place of presentation must be served upon the patient, his parents (if known to the superintendent) or his guardian. However, in the event the guardian is *unknown* to the superintendent, service shall be on the next of kin of the patient. If there is no next of kin or such person is unknown to the superintendent, then the superintendent is required to apply to the chancery court,[190] which will appoint a guardian[191] to defend the rights of the patient during the sterilization proceedings. The patient has the statutory right to attend these proceedings if a request to attend is made either by himself, his guardian, his parents, or next of kin who are duly served with notice.

At the hearing any party to the proceedings has the right to be represented by counsel, and legal evidence offered by any party may be received in addition to any records of the patient pertaining to confinement in any of the three state institutions listed. The statute[192] provides further that depositions taken by any party may be read in evidence if due notice is given. All recorded evidence is kept by the board and all oral evidence is reduced to writing in duplicate.

Before the board can issue an order for the sexual sterilization of any patient, it must find that: (1) ". . . the patient is insane, idiotic, imbecile, feebleminded or epileptic and by the laws of heredity is the probable potential parent of socially inadequate offsprings likewise afflicted. . . ."; (2) sexual sterilization will not jeopardize the general health of the patient; and (3) sexual sterilization of the inmate will promote the welfare of society and the patient.[193]

If the above requisites are found to exist, the board may order the sterilization of the patient[194] but the operation cannot be performed until 30 days after the issuance of the order. The statute further provides for appeal from the board's order[195] by the superintendent, the patient, his guardian, parents or next of kin within 30 days after issuance of the order, to chancery court.[196] The appeal is instituted by giving written notice to any board member and to the other parties

[190] The court referred to here is the chancery court located in the same county as the institution or the chancery judge in vacation. MISS. CODE ANN. § 6958 (1952).

[191] The guardian who is also served with process has an antiquated fee limited to $10. He can also be removed by the court. MISS. CODE ANN. § 6958 (1952).

[192] MISS. CODE ANN. § 6958 (1952).

[193] MISS. CODE ANN. § 6959 (1952).

[194] *Id.* However, " . . . nothing in this statute shall be construed to authorize the operation or castration nor the removal of sound organs from the body."

[195] MISS. CODE ANN. § 6960 (1952). If there is no provision for appeal, this procedure would be unconstitutional.

[196] This order is directed to the chancery court of the county in which the institution is situated. MISS. CODE ANN. § 6960 (1952).

in the proceedings. Thereafter the superintendent will file a certified copy of the petition, notice, evidence or orders with the chancery court.[197]

Upon appeal the chancery court is vested with broad statutory powers as respects the evidence that can be adducted upon said appeal. As a matter of course, the record of the administrative hearing is competent, but the statute further prescribes that the court may consider any other "pertinent and proper" legal evidence offered by any party to the appeal or which the court may order on its own motion. The chancery court has full power to revise, reaffirm, or reverse the decision of the administrative tribunal, and orders of the tribunal are stayed while the appeal is pending. Appeal from the decision of the chancery court may be sought by any affected party to the Mississippi Supreme Court[198] at any time within 30 days after the issuance of the chancery court's final order.[199]

The final provision under this topic[200] exempts from civil or criminal liability any person legally participating in a sterilization operation.

Recommendations

The professional fields which serve mentally ill and mentally retarded persons have seen massive growth in methods, in membership, and in public support of their work. New concepts of diagnosis, etiology, and treatment have been established. Unfortunately, Mississippi law does not reflect the concept of mental illness or mental retardation in keeping with current knowledge and modern practices of treatment, care and rehabilitation.

It is recommended that a special study committee be established by the Mississippi legislature to facilitate the development of a complete recodification of laws affecting the mentally ill and mentally retarded. Some essential tasks of such a committee would be to draft acts and evaluate the present status of the enforcement and operation of Mississippi's provisions regarding mental retardation and mental illness.

Merely a glance at this report will show the need for consistency and consolidation of provisions relating to these areas. This legislative committee could comprehensively review all legislation pertaining to the mentally retarded and mentally ill with a view toward updating

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[197] These instruments are certified by the chairman of the board or any board member in his absence. Miss. Code Ann. § 6960 (1952).

[198] Miss. Code Ann. § 6962 (1952).

[199] *Id.*

[200] Miss. Code Ann. § 6963 (1952).

the language of existing laws, eliminating inconsistencies and providing the necessary legal framework for the implementation of present program proposals.

It is recommended that the foregoing analysis serve as the beginning of an examination of all the legal provisions affecting mentally ill and retarded persons, including rules, regulations and practices in courts and administrative agencies throughout the state.

STUDENT COMMENTS

A LEGAL INTERNSHIP PROGRAM FOR THE UNIVERSITY OF MISSISSIPPI LAW SCHOOL?

> If the weakness of the apprentice system was to produce advocates without scholarship, the weakness of the law school system is to turn out scholars with no skill at advocacy.*
>
> *Mr. Justice Jackson, Associate Justice, United States Supreme Court*

Introduction

Since the field of legal education first became dominated by the law schools rather than the apprenticeship method, the problem of how to impart practical legal skills has faced every generation of legal educators. As a necessary reaction to the inadequacies of legal training by practitioners, law schools were born. "Perhaps there had to be a complete retreat to the campus and the classroom in order to divorce legal education from the vices of apprenticeship and from the practitioner trauma."[1] However, the time has long since passed when ". . . law schools had to work very hard to establish the legitimacy of law schools and legal theory as the subject of study . . . ."[2] Law schools are and have been for many years the accepted means of legal education. The challenge today to legal education "if it is to remain vigorous and command the respect of its own students and the society at large"[3] is "to incorporate the benefits of supervised experience for law students in the administration of justice."[4]

The purpose of this comment is to explore the need for a more practical "clinical" aspect to legal education, to survey what has happened across the country in this respect, and to suggest possibilities for the University of Mississippi Law School with the aid of suggestions and comments from members of the Mississippi State Bar Association.

I. Need for Clinical Legal Education

If we accept the proposition that law schools exist to educate students in the practice of law, as well as in the comprehension of legal

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* Jackson, *Training the Trial Lawyer: A Neglected Area of Legal Education*, 3 Stan. L. Rev. 48, 57 (1950).

[1] Address by William Pincus, The Herschel W. Arant Lecture, The Ohio State University College of Law, Feb. 6, 1969.

[2] Stolz, *Clinical Experience in American Legal Education: Why has it Failed?* 1, Oct. 1969 (unpublished manuscript on file in the Miss. L.J. office.)

[3] Address by William Pincus, *supra* note 1.

[4] *Id.*

theory and case analysis, it is reasonable to expect law schools to devote part of their curriculum to training students in this practice of law. It is undoubtedly true that until recently few law schools expended adequate time or money for training students in law practice.[5]

Perhaps the best explanation for this position of the law schools was their expectation that when the young lawyer entered practice he would quickly learn to apply what he had been taught. "We must not forget that, while we do not have formal apprenticeship training in America, we do have a rather broad and generous type of informal apprenticeship, whereby older lawyers in any community . . . gladly and freely lend a helping hand to the youngster."[6] To the extent that this is true, it is still a hazardous and unprofessional way to insure that a young practitioner gives reputable service to his client. From a profession which thinks highly of itself as a key component in the system of justice, it would seem more could be expected.

To bridge the gap between theory and practice, most law schools have initiated programs in moot court and trial practice with varying degrees of success. Though these have been a help, they obviously fall short of the realism and the urgency of the flesh and blood client with a real problem. Any law student who has had the opportunity to work with real clients during his law school career immediately senses the difference when he participates in moot court or trial practice. Furthermore, the scope of these programs is limited to trial or appellate advocacy. The world of legal drafting, negotiating, persuading, and numerous other legal skills is still untouched. The strengthening of the moot court and trial practice courses by adding new realism to their structure, as has been done at Ole Miss this year, is a step in the right direction. However, such efforts by definition cannot attain the level of realistic experience needed in the adequate preparation of the future lawyer.

Perhaps the best method by which to consider the void existing in clinical legal education is to compare the education of an attorney to that of a physician. We are all familiar with the role and work of the medical intern and resident, not to mention the large doses of clinical training received by the advanced medical student during his regular four year degree program.

> The study of medicine is not limited to the analysis of post-mortem reports, to see what mistakes were made by the attending physicians. The medical student is taught how to do it right in the first place. He watches the operation of eminent

[5] Landman, *The Curriculum of the Law School*, 47 A.B.A.J. 156, 158 (1961).

[6] McClain, *Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in the Law Schools*, 6 J. LEGAL ED. 302, 307 (1954).

> surgeons. He sees top-ranking physicians examine living patients. He learns to take a pulse. He listens to hearts and lungs. Most important of all, he does things not merely once, as a law class visits a courthouse, but literally hundreds and hundreds of times, until they are second nature.[7]

There can be no doubt that the law student's clinical training falls far short of what is depicted above. It is also true that he does not need as *much* clinical training as does the physician. However, rights, of property, liberty, and life, are not far below health in the mind of the public.

> Would you want a medical school graduate who had never even *witnessed* a surgical operation to perform an emergency appendectomy or other serious surgery upon you or one of your loved ones? Certainly not, yet under the training provided generally by the legal profession throughout the United States the public must submit to similar treatment at the hands of the inexperienced and untrained lawyer who has just been graduated from law school.[8]

Thus, the public has a crucial stake in the clinical training of the law student. The fortunate person, in most instances, can take his civil business elsewhere, but there surely are cases where this is not always true. And on the criminal side of the ledger, he could be in trouble if he is poor, for young lawyers frequently are appointed to defend indigents.

As professional men, lawyers—as well as the public—have an interest in the competence of their fellows, for the profession has nothing more or less to offer than its own members. It is praised or damned on the quality of the individual lawyer and his work. To authorize a new attorney to practice when basic skills have not been mastered is to risk discredit to the profession as well as the disdain of the public. "Granted that experience is invaluable to all professionals, there is no reason why the lawyer should be less competent to practice his profession upon graduation than the engineer, accountant, physician or dentist. Many of our young law graduates are a menace to their clients and society."[9]

Another striking contrast to the lack of clinical training in law school is found in the practice teaching requirement of undergraduate schools of education. One semester is allocated to the practice teaching block consisting of a preparation period, the practice teaching itself, and a period of examination and analysis of successes and failures that

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[7] Cantrall, *Economic Inventory of the Legal Profession: Lawyers can take Lesson from Doctors*, 38 A.B.A.J. 196, 199 (1952).

[8] Lefever, *Legal Internship*, 6 J. LEGAL ED. 504, 506 (1954) (comments in panel discussion).

[9] Landman, *supra* note 5, at 158.

occurred during the practice teaching. Does the prospective teacher need such practical training more than the prospective attorney? It would seem not. Perhaps the education program could serve as a more beneficial model than the medical internship. At the least, it gives legal educators more food for thought.

We have compared legal education to medical and teaching programs. We have seen that legal training has been, and is, less clinical than these. We have noted some possible effects upon the public and the profession itself when a new law graduate, untrained in practical methods and skills, represents clients in real situations. We must now look deeper to see if the law school should supply better practical training or continue in its traditional role, leaving the bulk of practical skills to be learned after graduation.

The debate has waxed eloquently. Dean Bradway of Duke University Law School offers insight from the law school vantage:

> [A] law school which does not teach a man method before he is admitted to the bar is, in effect, not discharging its full duty to the student, the profession, and the public. Young lawyers who do not know how to do what their clients expect of them are a menace to the man in the street and poor advertisements for the legal profession.[10]

One of the more outspoken practitioners who has expressed himself extensively on the subject is even more critical:

> The excuse for the existence of law schools is the training of young people to be lawyers. If they do not do that job well, they are not worthy of the support of society. . . . Society looks to the law schools to properly train young men and women to be, *upon graduation*, lawyers to whom the people can look for adequate, competent lawyer-services.
>
> Society's contract with the law schools is to train lawyers, not to produce half-lawyers, taught some of the theories of the law but not how to put those theories into practice.[11]

Perhaps the above comments are excessively harsh or even unwarranted, but they raise crucial questions which cannot be ignored. Law professors, too, recognize the shortcomings of the traditional legal education:

> Knowledge of institutions, history, techniques, and customs is passed on to the student to a greater or lesser degree in today's law schools. However, the student obtains only a small amount of practice in applying this knowledge to the law and facts of

[10] Bradway, *"Case Presentation" and the Legal Aid Clinic*, 1 J. LEGAL ED. 280, 281, (1948).

[11] Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907 (1952).

> particular problems as seen by lawyers. Here is where the weakness of the law school graduate shows up. He has a sound basic training and, in general, wide knowledge commensurate with his experience and maturity, but he often lacks ability to put the two together. He often lacks ability to do simple things . . . . He has seen all of the tools. He probably has had them demonstrated, but he needs practice in their use.[12]

Perhaps even more than law school administrators, law professors, or practitioners, trial judges of our state courts are in the best position to judge the strengths and weaknesses of new practitioners insofar as courtroom preparation is concerned. Addressing himself to the question of the need for more practical legal preparation, Circuit Judge N. S. Sweat, Jr., of the First Judicial District of Mississippi, had these observations from his experience as a practitioner, prosecutor and trial judge.

> The beginning practitioner of law should be able to enter the trial courtroom and the real world of litigation with some competence, and with some confidence. He should be able to represent his client in such a manner as to reflect some credit upon his profession and upon his bar. That the converse generally is, and has been for a long time, the case, here and elsewhere, does not mean that we must accept it as natural, or right, or inevitable. Experiential, or clinical, or practical training has long been considered essential for the medical student, and for the education student. It is also essential for the law student. Almost every practicing lawyer whose memory serves him honestly will sympathetically recognize the need.[13]

Judge Sweat is in an ideal position to view the student being prepared as well as to view the new practitioner. As adjunct professor at the University of Mississippi School of Law, he has had the opportunity to observe many law students and has contributed significantly to helping close the gap between theory and practice by his revamped course in trial practice. Yet this experience has reinforced his opinion of the need for a clinical program for the law school.

It would be misleading to give the impression that everyone concerned with legal education espouses the clinical training concept or thinks the law schools have failed in their responsibility to produce suitable new practitioners. Joseph A. McClain, Jr., while Dean of Duke University School of Law, in answer to the criticism of the weak state of practical know-how of many new lawyers, defended the aims of the traditional system:

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[12] Joiner, *Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in Law Schools*, 6 J. LEGAL ED. 295, 297-98 (1954).

[13] Letter from Judge N. S. Sweat, Jr. to George Q. Evans, Nov. 16, 1969, on file in the MISS. L.J. office.

> [T]he lawyer who does not have a broad background of scholarship and strong analytical reasoning ability, is not cured by a reasonably short experience in practice. The public is much more apt to suffer seriously from this type over the long pull than from the neophyte who lacks practical know-how at the beginning of his practice.[14]

The point of Dean McClain is well taken. If a clinical program means the student's "broad background of scholarship and strong analytical reasoning ability" must suffer considerably, then one evil would be replaced by another. The law student needs both types of legal education—scholarly, analytical and theoretical as well as practical. The question is not one over the other, but, rather, the proper combination of the two. The latter will be worthless without a strong foundation in the former. But is not the former incomplete without the complement of the latter? It is submitted that the excess to date has been at the expense of practice and not *vice versa*. The time to strike the proper balance has come.

Granted that a clinical program should not be made a part of the law school curriculum at the expense of a solid scholarly, analytical education, the question arises as to the value and place of a clinical program within the current three year legal curriculum. Would the invaluable traditional education suffer if as much as one semester of the advanced law student's time was set aside for a clinical program? Or would the clinical program actually add to and enliven the traditional courses of the advanced student?

Among present third year students the classroom and case method quickly lose the hold they once had over him. The expectation of graduation, and, more importantly, the need to try out, to use, what has been carefully gathered and stored for two years often have the effect of rendering the third year less fruitful than the first two. The repetition of casebook after casebook, analysis after analysis, becomes deadening to many. They learn the system and method and get by without briefing. Interest often wanes and for many the last year becomes a period of marking time, knowing that the time is imminent to do in practice what has been learned in the classroom. Far too often serious boredom becomes the mark of the third year student.

Realizing this problem, a Special Committee on Curriculum Revision at the University of Mississippi School of Law had this opinion regarding a clinical internship as a possible solution:

> . . . As the classroom methods become boring and perhaps less effective for a student in the latter part of his law school career, an internship would be likely to be an effective teaching

[14] McClain, *supra* note 6, at 307.

> device in itself and would be likely to substantially increase his interest in the classroom courses so that they would become more effective.[15]

This realization is becoming more and more pronounced in law schools across the country.

> It is the conclusion of the [New York University] Committee that basic legal skills—i.e. how to read and comprehend a case or statute, how to synthesize seemingly disparate case holdings, how to distinguish or extrapolate from the core facts of a case to a somewhat different fact situation—are fully learned by all qualified students in this law school after two years of traditional legal training. It is not only the opinion of most students who have been consulted, but also of many eminent faculty representatives who have criticized traditional law school curricular offerings . . . , that in terms of imparting the arts and skills of a lawyer the third year of law school is largely an unnecessary repetition of exercises already covered in the first and second years. The Committee agrees with those who have argued that the serious problem of student motivation in the third year of law school derives largely from this quality of repetition.
>
> . . . The appropriate way to cope with these difficulties is through expanded clinical programs that would accord students a sense of relevance (through the intensely contemporary quality of subject matter) and a sense of reality (by providing them an opportunity to deal with real clients and real problems).[16]

The internship is a teaching and educational device. It is not an escape from legal education ahead of time, but a valuable addition to and an integral part of the curriculum in the same way that practice teaching is for the prospective teacher. Any internship program must therefore be closely supervised by members of the law faculty and tied closely to and integrated into the law school curriculum. It "must be justified primarily on the basis of its educational value and law professors are the primary instrument for legal education. Without substantial supervision by faculty members, students might be used to produce economic goods that involve little or no educational payoff."[17]

In an effort to determine the opinion of a representative cross-section of the Mississippi State Bar, a questionnaire[18] was sent to all the

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[15] Minutes of Special Committee on Curriculum Revision, University of Mississippi School of Law, July 22, 1968, at 1.

[16] COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, CLINICAL LEGAL EDUCATION IN THE LAW SCHOOL CURRICULUM, *Annual Report, New York University School of Law Curriculum Committee, 1969* 27, 44-45 (1969).

[17] *Id. Report of the Clinical Committee, University of California at Los Angeles School of Law, 1968* 7, 16.

[18] See Appendix.

officers and commissioners of the State Bar and the President of the Junior Bar. In each of the sixteen replies there was an affirmative response to Question 1: "In your opinion is there a need for more practical training in law school?" and to Question 2: "If yes, do you favor the establishment of a legal internship program at the University of Mississippi Law School to meet this need?"

In elaborating on the subjects touched in the questionnaire, Hon. William A. Bacon, President-Elect of the Mississippi State Bar, expressed the dominant opinion in the following manner:

> I think that the process for legal education is behind the times in not providing practical experience and training for lawyers when they finish law school. There is an old saying that when a young man finishes law school he knows all the law but "he doesn't know the way to the courthouse."
>
> . . .
>
> . . . I certainly recommend that some type of practical training be worked into the Ole Miss Law School schedule.[19]

Reflecting on his own experiences as a law student, Hon. James Simrall, Jr. expressed his support for a student internship thusly:

> I had the good fortune to be able to work one summer while I was in law school in the office of one of the leading firms in Jackson, Mississippi, and another summer in the office of a very fine firm in Canton, Mississippi. I know from my own personal experience that the knowledge I obtained and the experience I had in these two summers proved invaluable to me when I started out in the actual practice. . . .
>
> I most strongly favor the establishment of a legal internship program as a part of the *required* work at the University of Mississippi Law School.[20]

In summation it is submitted that clinical internships providing practical legal education while in law school are needed. From all seg-

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[19] Letter from William A. Bacon to the *Mississippi Law Journal*, Nov. 14, 1969, on file in the Miss. L.J. office. Mr. Bacon also states:

> The simplest matters of procedure ordinarily stump a student just out of law school. For instance, the first client I ever had when I started the practice of law in 1935 walked into my office and wanted to know how much I would charge to show him how to probate a claim against an estate. I did not have the slightest notion of what was required. You no doubt know that the probation of a claim consists of merely handing the claim to the Chancery Clerk and signing a sworn affidavit which he has prepared and the clerk files the claim against the estate. That is all there is to it.
>
> Recently 13 lawyers from Ole Miss were presented to the Supreme Court by me for admission to practice before the Supreme Court. They had just finished Ole Miss Law School the day before. I asked the group if anyone of them knew how to probate a claim against an estate. Not one of them knew what to do. That is a simple matter but illustrates what I am talking about.

[20] Letter from James Simrall, Jr. to George Q. Evans. Nov. 10, 1969, on file in the Miss. L.J. office.

ments of the legal profession we have heard this need expressed, and particularly from the Mississippi State Bar Association. The internship would add to the traditional legal education and build upon its solid foundation. If not so constructed, it would be an utter failure in producing a better educated lawyer in a fuller sense of the word. To properly establish and administer such an internship, a sufficient expenditure of time, effort and money[21] would be required. The decision whether these expenditures are warranted must be made. The need does seem to exist. The question then becomes how to meet it.

II. Survey of Existing Types of Clinical Programs

Throughout the country many various approaches have been taken to satisfy the admittedly valid criticism that law schools are failing to instruct properly students in the practicalities of law practice. A clinical legal education program was started at the University of Tennessee College of Law as early as 1947,[22] and every major law school is, or should be, now considering some sort of practical training for its students. Only a summary survey of several general types of existing clinical programs is offered here.

The existing programs can be divided into at least four categories which, like most categorizations, tend to oversimplify and ignore the multi-faceted variations in such pograms.

The first major category is that of the traditional legal aid clinic. Examples of such an approach are the programs at Ohio State,[23] Tennessee,[24] Emory[25] and Southern Methodist.[26] The University of Mississippi School of Law also experimented on a limited scale with this type of program in its North Mississippi Rural Legal Services until conditions completely apart from its success as a teaching device forced its discontinuance.

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[21] A discussion of funding, including possible outside grants, is included in Part III, *infra*.

[22] Miller, *The Defender Project at University of Tennessee College of Law*, in Proceedings, The Asheville Conference of Law School Deans on Education for Professional Responsibility 47 (1965).

[23] *See* Selby and Messerman, *The Persuasive Approach (including Legal Clinic) Project at Ohio State University College of Law*, in Proceedings, The Asheville Conference of Law School Deans on Education for Professional Responsibility 60 (1965).

[24] *See* Miller, *supra* note 22.

[25] *See* Note, *Legal Education—A Step in the Practical Direction*, 21 S.C. L. Rev. 236, 242 (1969).

[26] *See* Council on Education in Professional Responsibility, *Professional Responsibility Project at Southern Methodist University Law School*, in Proceedings, The Asheville Conference of Law School Deans on Education for Professional Responsibility 84 (1965).

The Emory Community Legal Services Center is an outstanding example of the traditional legal aid clinic. Under a 1967 statute[27] students in their third year of law school are allowed to engage in limited law practice.[28] These students perform the same legal services for the poor and indigent, under close supervision of a practicing attorney, as the more affluent person receives from privately employed counsel. The Emory practical legal education program is a required activity in that every student must donate a minimum of thirty hours to some recognized legal aid agency.[29]

Another category of clinical legal education includes those programs which, instead of actually placing the student in a true lawyer role, expose him to various social and governmental agencies and institutions in the community. Programs of this type are found at Denver[30] and Willamette.[31] As an example, the Professional Responsibility project at the University of Denver Law School is a three year program comprised of field trips to various agency offices in the first year and clinical experiences in four clinical blocks (Penological, Medical-Mental, Social Problems and Attorney-Client) in the second and third years.[32] The emphasis in this type of internship is on broadening the law student's appreciation and understanding of social problems with definite legal consequences and in increasing the student's appreciation of professional responsibility.

The third category is actual participation in the work of lawyers (other than legal aid), whether in practicing attorneys' offices, prosecutors' offices, public defenders' offices, or serving as a clerk to a trial judge. Internships in this category emphasize the development of practical skills in the law student. Several programs in this area deserve comment.

The Trial Judge Clerkship program at the University of Kansas is based upon full-time service by students for seven to eight weeks as clerks to selected state trial judges, during which time the students observe and participate in everything the trial judge does.[33] The student

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[27] GA. CODE ANN. § 9-401.1 (Supp. 1969).

[28] This problem area is developed more fully in Part III, *infra*.

[29] Note, *Legal Education*, *supra* note 25, at 242.

[30] *See* COUNCIL ON EDUCATION IN PROFESSIONAL RESPONSIBILITY, *Professional Responsibility Project at University of Denver Law School*, in PROCEEDINGS, THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY 72 (1965).

[31] *See* COUNCIL ON EDUCATION IN PROFESSIONAL RESPONSIBILITY, *Professional Responsibility Project at Willamette University Law School*, in PROCEEDINGS, THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY 91 (1965).

[32] COUNCIL ON EDUCATION IN PROFESSIONAL RESPONSIBILITY, *supra* note 30.

[33] Casad, *The Kansas Trial Judge Clerkship Program*, 18 J. LEGAL ED. 75 (1965).

clerks perform duties much the same as clerks of federal district judges,[34] including researching and writing legal memoranda, preparing drafts of orders or jury instructions, and whatever else the judge may see fit to assign.[35] The program concludes with a classroom seminar in which the participants exchange ideas and experiences in an attempt to advance their understanding of practice skills and professional responsibility.[36]

Another program, designated "A Rural Apprenticeship Program for the Plains," is sponsored jointly by the University of South Dakota and the University of North Dakota. Under this program selected law students are placed in the offices of practicing attorneys throughout the two states. The students work full-time for ten weeks between their second and third years of law school. This field work is both preceded and followed by a seminar class. According to the project director at the University of South Dakota, Dean John D. Scarlett, "The initial reaction of both the students and the lawyers has been nothing short of enthusiastic."[37]

The Oklahoma Legal Internship Pilot Program, directed by the Oklahoma Bar Association, is perhaps the best of the existing skills-development programs.[38] The foundation of the Oklahoma program is a rule adopted by the Oklahoma Supreme Court allowing approved law student applicants to engage in limited law practice.[39] After being granted a limited license to practice, the student works under the supervision of a practicing attorney or in an agency office, such as legal aid services or prosecutors' offices. Although the data obtained through the pilot program has not been fully evaluated, it appears to have been of real value both to the Bar and to the individual students.[40]

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[34] COUNCIL ON EDUCATION IN PROFESSIONAL RESPONSIBILITY, *Trial Court Clerkship Program at the University of Kansas School of Law*, in PROCEEDINGS, THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS OF EDUCATION FOR PROFESSIONAL RESPONSIBILITY 75 (1965).

[35] Casad, *supra* note 33, at 79.

[36] Id. at 80.

[37] COUNCIL ON EDUCATION IN PROFESSIONAL RESPONSIBILITY, *Rural Apprenticeship Program at University of North Dakota and University of South Dakota Law Schools*, in PROCEEDINGS, THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY 82, 83 (1965).

[38] Note, *Legal Education*, *supra* note 25, at 241.

[39] *See* Rules Creating and Controlling the Oklahoma Bar Association, art 2, § 6 in 5 OKLA. ST. ANN. ch. 1 app. 1 (Supp. 1969). It is submitted that the Mississippi Supreme Court has equivalent rule-making power so as to enable it to promulgate such a student practice rule. *See* Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 n.3 (Miss. 1968).

[40] Culp, Deaton & Cooper, *Legal Internship Program, Oklahoma Bar Association*, STUDENT LAWYER J., vol. 14, Dec. 1968, at 14, 17.

A final example in this category is the University of Mississippi School of Law, which has recently sponsored a program whereby some students worked as assistants to assigned counsel in state and federal courts and as assistants in the Pascagoula Public Defender Program. Funds for this three year program, which ended in March 1969, were made available by the National Defender Project. Since the funds have been exhausted, only an occasional student in the criminal procedure course has served as an assistant to assigned counsel in the Oxford area. Plans now call for twenty students to serve as assistants to assigned counsel in federal court in the Northern District of Mississippi during the spring semester of 1970. These students are to be paid expenses under provisions of the Criminal Justice Act.

A fourth type of clinical legal education is what might be termed an "in-school" research clinic. This type of program involves participating students in research on actual legal problems. One such plan, the Prison Research Council, is in operation at the University of Pennsylvania Law School and is coordinated and administered by its students. Its purpose is to give post-conviction research aid to inmates in prisons, primarily the Federal Penitentiary at Lewisburg, Pennsylvania. Prisoners' letters seeking answers to legal questions are sent to the project director, Professor Curtis R. Reitz, who turns the problem over to an interested student. The student, under the supervision and guidance of Professor Reitz, researches the legal issues presented and writes an opinion letter to the prisoner.[41] At no time do the students become directly involved with the prisoner personally or with any post-conviction legal action taken by or on behalf of the prisoner. The service offered by the Prison Research Council is limited to utilizing the facilities of the University and the knowledge and ability of the student to analyze and answer legal inquiries.

Another "in-school" research clinic program presently exists at Ole Miss. The Legal Research Exchange, operated by Phi Alpha Delta Legal Fraternity, makes available to attorneys in Mississippi and surrounding states, the facilities of the University of Mississippi Law Library. Phi Alpha Delta serves as a clearing house for practicing attorneys' requests for research on legal problems with the resulting research and memoranda prepared by selected students. This program has been in existence for many years and has proved valuable not only to attorneys, but to the students as well, both as a method of obtaining experience in preparing legal memoranda and as an income producing activity.

In addition to the above categories of programs providing practical legal training, some states require a period of "clerkship" after gradu-

[41] *See* Silverberg, *Law School Legal Aid Clinics: A Sample Plan: Their Legal Status*, 117 U. PA. L. REV. 970 (1969).

ation from law school before the individual is eligible for admission to the bar. Delaware requires the law school graduate to serve a six month clerkship, while Rhode Island requires three months.[42] Other states require that the bar applicant take a special skills and methods or a general practice course before admission to the bar.[43]

This brief survey points out four general areas in which legal internships have been established to date. It is not an effort to be exhaustive in cataloging the numerous programs that have been in operation, but, rather, is an attempt to show types of programs that have been inaugurated to further clinical legal education.

III. Possibilities for Clinical Internships at the University of Mississippi School of Law

Having discussed the question of the need for clinical internships and having considered the trends in law schools across the country, we now turn to the practical situation of what can or should be done at the University of Mississippi Law School. Our purpose is not to say "this is the best way," or "that will surely fail." But, rather, our intention is to pose some possibilities with the hope that the Bar, judiciary and law school will be motivated to critical thought and discussion and, eventually, to actual implementation of a clinical internship at the University of Mississippi.

Internships that have been tried elsewhere or present themselves as possibilities for Ole Miss include the following, which is by no means a necessarily conclusive listing:

(1) practicing attorneys' offices,
(2) clerk to circuit judges,
(3) clerk to chancery judges,
(4) bar sponsored legal services offices,
(5) non-bar sponsored legal services offices,
(6) prosecutors' offices,
(7) assigned counsel in federal and state courts,
(8) public defenders' offices.

Before a student should be placed in any of the above interships, a clear understanding must be had between the law school and the attorney or judge as to the purpose of the student's assignment. The non-law school participant must, first, be willing and interested in working with a student. If he is not, any productive benefit is doomed to failure at the start. Secondly, the fact that the primary purpose of the intern-

[42] Note, *Legal Education*, *supra* note 25, at 243.
[43] *Id.*

ship is *educational* must be understood and accepted. The law student should be placed to see and to participate in the broadest range of legal activities possible. These activities should include being present for a jury trial and chancery proceeding, observing client interviews and, later, conducting such interviews, checking a land title and writing the certificate, investigating facts of cases, and familiarizing himself with the plethora of records and procedures in the various public offices of the city and county.[44] Ideally, exposure to civil and criminal matters, preparation of legal instruments from pleadings and motions to simple deeds, contracts, wills and loan closings, and the rudimentary understanding of procedural requirements should all be included within the ambit of the student's experience during the internship.

Undoubtedly the ideal broad exposure depicted above is unattainable in any one of the eight internships suggested with the possible exception of a diversified practitioner's office. And, even in such an office the probability of touching everything desirable is remote. However, the ideal points out a goal and the direction in which to proceed, while the following approaches should be avoided. The student should not be relegated to the status of a research assistant. The facilities and opportunity for research are adequately provided for at the law school. This is not to say the student should not be assigned some research, but that it simply should not be his sole or even his primary assignment.

Neither should the student be used as a clerk or errand boy to satisfy the practical exigencies that arise in an office. Economic benefit to the practitioner is not the purpose of the internship.

Finally, the student should not be trained as a specialist. He should see more than tax problems and do more than search titles or work with estate plans. One purpose of the internship is to aid the student in deciding on the type of law he is interested in pursuing after graduation, perhaps in a specialized manner. If the student is so aided, this can redound to his own benefit, and that of a future employer as well, by saving on changes from one firm to another and experiments in different interest areas after employment.

For an internship to achieve the goals outlined, the attorney or judge participating must do more than merely tolerate the presence of a law student in his office. One prominent young Mississippi attorney has expressed this point even more strongly: "The effectiveness of such a program depends solely upon the ability of the practicing attorney and the time he is willing to spend in the training of the law student."[45] The attorney must actively be interested in improving the legal edu-

[44] Letter from Pat H. Scanlon to George Q. Evans and Anson Bob Chunn, Nov. 18, 1969, on file in the Miss. L.J. office.

[45] *Id.*

cation of the future bar, for the benefit of himself, the profession, and the public, as well as for the student's benefit. Thus, lawyers and judges from outside the law school must voluntarily agree to participate in the internship with the understanding of its purposes. The law school administration would have the duty of explaining the purposes of the internship and selecting those participants who show the greatest desire to aid the student and legal education in Mississippi. This aspect is so important that lawyers and judges not fulfilling this purpose should be excluded from later participation.

Considering the purposes of the internship and the evils to be avoided, it would seem the practicing attorney's office would readily lend itself to such a venture. The response of the Mississippi bar to this possibility evidences overwhelming approval.[46] Furthermore, the opinion has been expressed by a Mississippi Bar Commissioner, James Simrall, Jr., that the office should be that of a general practitioner.[47]

The advantages of an internship in the office of a general practitioner are obvious, assuming the attorney is willing to expend the requisite time and energy. More than any other, such an internship offers the broadest *possible* range of experience for the student. In comparison, clerkships to circuit and chancery Judges offer more specialized experience. On the positive side there would be great opportunity to witness all aspects of trial procedure and techniques as well as the intricacies of the court's workings. To the extent the same student spent time with both a circuit judge and chancery judge this would be especially true. Trial judge clerkships would also provide broad exposure to most types of legal documents and normal substantive issues. In addition, "Besides the obvious value in giving students a better orientation to courtroom and courthouse practice, the association with the judge gives the student a better appreciation of the concept of professional responsibility."[48]

Weaknesses in judicial clerkships are also evident. The student would be removed from the world of client interviews, factual investigations and the real life experience of partisan advocacy.

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[46] See Appendix.

[47] I believe the most advantageous thing for the law student would be to spend some time in the office of a lawyer or a firm of lawyers that are engaged in the general practice of law. By the phrase "general practice of law," I mean both a civil practice (which may be the predominant part) and a criminal practice. Unless he should elect to become a specialist in the criminal practice field, the average lawyer finds that by far the greatest portion of his work and the greatest portion of his income come from the civil practice. It would be, in my opinion, of the greatest benefit to the law student if the office in which he was placed did a good deal of court work, including representing both plaintiffs and defendants.

Letter from James Simrall, Jr. to George Q. Evans, Nov. 10, 1969, on file in the MISS. L.J. office.

[48] COUNCIL ON EDUCATION IN PROFESSIONAL RESPONSIBILITY, *supra* note 34.

The clerkship, in sum, would be a valuable experience even though some desirable aspects would be missing. The key again would be the active interest of the individual judge in the student and his belief in the worthwhileness of the clerkship. The University of Kansas School of Law, which has had a trial judge clerkship program for several years has been well pleased with the results to date. In fact, "Experience with the program so far has been so good that it must be given a fairly high priority in future curriculum planning."[49]

Twelve of sixteen Mississippi bar members answering the questionnaire thought clerkships to circuit judges would be advantageous to the future practitioner.[50] Two of these also mentioned clerkships to chancery judges as possibilities, though this was not a choice listed on the questionnaire. Seemingly, a combination internship with time spent with both circuit and chancery judges would be a very worthwhile possibility.

By far the most common internship programs developed to date nationally have consisted, in one form or another, of work in a legal aid clinic operated in the law school itself or in an area nearby. Perhaps this is due primarily to the availability of government or foundation funding, the increased concern with the profession's responsibility to provide legal services to the poor and the great demand for manpower to assist in legal services offices.

The greatest advantages of legal services internships would seem to be frequent opportunity to interview clients and investigate legal claims, to check courthouse records, to research live legal problems and to develop a sense of professional responsibility to the indigent. Usually there is ample opportunity to become involved in the defense of misdemeanors, in youth court matters and in welfare, social security and workmen's compensation claims.

Work in legal services offices, however, is limited to legal problems of the poor and non-fee producing suits. Thus, in effect, plaintiff's tort cases, estate work, tax planning, corporate work, and, in general, sophisticated legal problems in the world of business and finance are not within the purview of a legal services office—a disadvantage.

Thirteen of sixteen bar members responding to the questionnaire approved of internships in bar sponsored legal services offices, while only four of the sixteen approved of work in non-bar sponsored legal services programs.[51] It is apparent that the Bar recognizes the unique value in legal services work despite its limitations.

At present there is a determined effort to establish a legal services program under the auspices of the Mississippi State Bar with offices at

[49] Casad, *supra* note 33, at 84.

[50] See Appendix.

[51] See Appendix.

various cities throughout the state. If such a program becomes a reality, an excellent opportunity will present itself to both the bar and the law school to utilize this program as a teaching service and to help satisfy the manpower requirements necessary to meet the legal needs of the poor in Mississippi.

An internship consisting of serving as assistants to counsel assigned to defend indigents in federal and state criminal cases is another possibility. However, unless Mississippi adopts a public defender system, such a program would be sporadic and indefinite. Students could not be called to serve at locations around the state on a hit or miss basis. Even with a public defender system, which would provide the necessary continuity, such an internship would suffer the disadvantages of being limited to criminal defense work. On the other hand, valuable experience in client interviews, trial procedure, case presentation and the basic workings of the legal system with real people could be provided. The questionnaire reveals that slightly more than fifty per cent of those responding thought work with assigned counsel or a public defender would be advantageous to the future practitioner, while twelve out of the sixteen approved a program which would have students working in prosecutors' offices.[52]

The prosecutors' office internship would offer the continuity of a public defender program and would also suffer the same weaknesses and offer similar strengths. Work would be limited to criminal law, yet wide acquaintance with many basic legal tools, techniques and procedures would be possible.

Regardless of which of the above possibilities or combination thereof would prove, practically and ideally, most acceptable, many common considerations present themselves in the implementation of any internship. An attempt in this paper to offer a detailed proposal for implementation would be presumptious on the part of the authors. We will thus point to questions and considerations of importance without seeking to offer answers and conclusions.

A primary decision concerning the time allocated to the internship would be of central importance. Due to the geographical isolation of Ole Miss, it would seem mandatory that any program be carried out away from the law school. There simply are not sufficient legal offices of any description in the immediate Oxford area to accommodate more than a few students. Thus, we initially are concerned with what has been called a "semester off" or "quarter off"[53] program. For one semes-

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[52] See Appendix.

[53] COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, *supra* note 17, at 13.

ter of law school the student would be an intern in an office somewhere in Mississippi.

The best time for this internship would seem to be the next to last semester before graduation. At this time the student should be well grounded in substantive course work so as to profit himself and to be of true aid to clients and his sponsor during the internship. Furthermore, the return to the law school for his last semester meets the crucial need to consolidate his own internship experiences, to share these with others, to ask for and receive faculty direction regarding problems that arose and to relate his new experience to at least one group of courses, and hopefully to relate previous courses to real legal problems that have been faced. Seminars could be used to help achieve these goals.

Since Ole Miss has graduates in January and August, as well as in June, internships would be continuous. Of course, the number of internees would vary from one semester to the next. The basic standard perhaps could be a three month period in the legal office involved. Due to the varying calendar lengths of the three law school sessions, some scheduling changes would probably be called for to equalize as much as possible the internship of the June, January and August graduate.

To be a viable part of the law school curriculum, and not simply a valuable extra-curricular activity, credit toward graduation must be given to the internship. To justify this credit the internship thus must be constructed as an integral part of legal education, not as a valuable but non-essential part time or extra activity.

The question becomes, "How much credit?" Only the faculty and administration can ultimately answer this question. It would seem, however, that ten credit hours would be a reasonable amount consistent with educational standards. To justify this allocation faculty involvement at every level of the internship would be necessary. One or more faculty members would have to be assigned full time to the administration or supervision of the internship program. Orientation before, supervision during, and analysis after the internship would seem to be a necessity. The details and structure of the internship would definitely require much thought, effort, and planning.

A closely related consideration to the questions of time allocated to and credit given for an internship is the question of whether such a program should be elective or required.[54] If the internship is considered an integral part of the whole legal education, it would seem that it should be required of every student. If it is considered to be something

[54] The Bar's response to the questionnaire evidences a division of opinion on this point. Ten of the sixteen attorneys responding felt that the internship should be a required element of the law school curriculum while six thought that participation should be optional. See Appendix.

extra-curricular, then it should not be. Perhaps there should be an initial experimental elective program since the internship is a step in a new and uncharted direction in Mississippi. If, after careful analysis, this experiment proved to achieve the desired results, then it could be required of all students.

A collateral consideration in this area is the case of the small number of students who have no interest in practicing law, but who for one reason or another deem a legal education to be valuable. An internship might be unrelated to their purposes in attending law school, and thus possibly should be elective.[55] It is difficult to imagine, however, how a properly planned and supervised internship could actually be detrimental to such students. It might even spark interest in some.

As seems to be the case in all matters human, money and financing will be of major practical concern in the establishment of an internship. To provide proper supervision, faculty members must be made available, which probably will require additional faculty personnel. It must be emphasized again that "an effective clinical program turns upon effective faculty supervision."[56] Such supervision will necessitate a lower faculty-student ratio than normally exists in the average case method class. Seminars, student and employer reports, and perhaps a student paper at the end of the internship will all demand faculty attention on some kind of personalized basis. Adequate faculty manpower will thus be an essential ingredient of a successful internship and money will be required to provide this manpower. An attempt to economize in this area could prove disastrous.

The administration of the internship will also require monetary outlays. Obviously secretarial and clerical demands will be present, as well as supplies and other administrative costs.

A final financial concern will be that of the individual student. A semester off campus will certainly add new expenses to many budgets. Practically speaking, since a majority of law students are married (by their next to last semester of school) and since most single students live in apartments or houses off campus, all but a very few students would be faced with paying rent on a "second home" for the semester. Other expenses would in all likelihood increase. Since the regular tuition fee probably still would be required, undoubtedly some students would experience financial pressure.

Several possible solutions are apparent. If in existence, emergency scholarship funds in small amounts might possibly be made available

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[55] Comments on questionnaire from W. B. Jones, Nov. 1969, on file in the Miss. L.J. office.

[56] COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, *supra* note 16, at 50.

on the basis of need, and low interest loans could probably be obtained through the law school. Also, the offices involved in the internships hopefully could provide some payment themselves.

Of the various possible internships discussed, it is not inconceivable that all of them would have some funds with which to at least reimburse students for expenses. Legal services programs normally are funded to pay a certain number of students. Funds would perhaps be most available in such a program. It would seem that most practicing attorneys who might be involved in an internship would be able to provide some minimum stipend. However, an otherwise appropriate attorney should not be excluded if he were unable or even unwilling to pay. Judges, prosecutors and public defenders perhaps would be in less attractive positions to offer compensation.

Financial questions as regards both the law school and the students must be an area of some concern. However, if an internship is considered valuable, or even essential, then necessary sacrifices must be made on the part of the legislature and the law school on the one hand and the students and the lawyers on the other. The burden on the former could possibly be eased by foundation grants such as those provided by the Council on Legal Education for Professional Responsibility[57] or by Congressional funding through Title XI of the Higher Education Act.[58] The sacrifice that might be required of some students would seem to be no greater than that routinely demanded of medical interns or student teachers. If the internship is properly planned, the improved professional competence and monetary return should be adequate reward to the student and the lawyer for any short-term sacrifices.

A final thought on the money question concerns equalizing student income, if any, from the internship. If, for example, students were involved in two different internships at the same time and one office had student funds available and the other did not, it would be unfair and detrimental to the entire program to have some students receiving incomes and others not. Also, one internship might possibly pay more than the other. Since the goal of the internship is for the student to become a better lawyer and not to make money, perhaps all income received could be pooled and distributed equally among all students involved in the internship that semester.

There is one final area of consideration that must be mentioned as

[57] Newsletter, Council on Legal Education for Professional Responsibility, May 1969.

[58] In 1968, Congress amended the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (Nov. 8, 1965), to authorize payments to accredited law schools "to provide clinical experience to students in the practice of law . . . ." Pub. L. No. 90-575, 82 Stat. 1048-49 (Oct. 16, 1968). However, as of this writing funds for such payments have not been appropriated.

being of considerable importance. At present twenty-one jurisdictions have adopted some form of student practice procedure, either by statute or court rule.[59] Of these twenty-one, nineteen have adopted such procedures since 1960 and fifteen since 1965.[60] Furthermore, the American Bar Association in 1969 adopted a Proposed Model Rule Relative to Legal Assistance by Law Students and has urged its consideration by the states.[61] It would seem, therefore, that a current trend has developed toward student law practice in certain limited circumstances and under highly supervised programs.

Possibly a student practice rule in Mississippi would be of aid in completing the student's experience during his internship program. To insure adequate professional representation of clients, great care would have to be taken to provide close personal supervision of the practicing law student. It is significant that in response to the questionnaire the bar responded eleven to five in favor of a properly supervised student practice procedure. It would seem that this topic at least deserves deliberation on the part of the judiciary, legislature, bar and law school administration.

Conclusion

We have discussed the need for clinical legal education, surveyed existing types of clinical programs, and proposed some possibilities for clinical internships at the University of Mississippi. We have found that there is overwhelming affirmance of the need for clinical internships as a part of our legal education and have seen which types of programs are most favored by the Mississippi Bar. We hopefully have raised questions of practical, as well as theoretical, significance in the implementation of a clinical program for Ole Miss.

The time has now come for a response to the need which exists. Presently, a small committee of the law faculty is working in this area and individuals in various positions are doing what is possible when the opportunity arises. What seems to be needed is a broad based committee composed of faculty, administration, bar members, students and judiciary with a definite purpose and time-table. This committee would have to incorporate and coordinate the ideas of all the various elements of the legal profession in Mississippi. To work properly it is essential that a consensus of the participating elements of the legal

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[59] Newsletter, Council on Legal Education for Professional Responsibility, Mar. 1969, at 8.

[60] *Id.*

[61] Report of A.B.A. House of Delegates, Judicial Administration (Report No. 28), January 1969.

profession in Mississippi be obtained in the planning as well as the workings of the internship program.

Two concerns of any such committee appear paramount. Time is of the essence if the thesis of this comment—that there is a need for clinical education—is accepted as true. No more graduating classes than necessary should be deprived of this practical education. On the other hand, great loss could result if a poorly conceived and hastily planned program were put into effect. Quality should not be sacrificed for expediency. Thus, the committee would be faced with the need to act expeditiously but on sound findings of fact and experience and with careful and meticulous planning. Surely the time for procrastination has passed. The need is great and the hour is late as expressed by Chief Justice Warren E. Burger of the United States Supreme Court:

> [N]ot all Law Schools have failed to see the need for what might be called "clinical" or "practical" exposure of law students to the realities they will face in practice. . . . A goodly number—but far too few—have shaken off the dead hand of the past and have begun to work toward what we now call "clinical" methods of teaching, but even the best of these efforts must be broadened.[62]

Anson Bob Chunn
George Q. Evans

APPENDIX

QUESTIONNAIRE*

1. In your opinion is there a need for more practical training in law school? Yes___(16) No.___(0) (If no, please explain below)
2. If yes, do you favor the establishment of a legal internship program at the University of Mississippi Law School to meet this need? Yes___(16) No___(0) (If no, please explain below)
3. If yes, please check as many of the following possible areas for an internship program as you would deem advantageous to the future practitioner.
   (a) Assistants to practicing attorneys throughout the state.___(15)
   (b) Assistants to circuit judges throughout the state.___(12)
   (c) Assistants in bar sponsored legal services offices throughout the the state.___(13)

[62] Newsletter, COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, Nov. 1969, at 10.

* This questionnaire was sent to 24 selected members of the Mississippi State Bar. The figures in parentheses represent the sixteen returns. Comments have been omitted here but liberally drawn upon in the text.

(d) Assistants in non-bar sponsored legal services offices throughout the state___ (4)

(e) Assistants in prosecutors' offices.___ (12)

(f) Assistants to assigned counsel in federal and state courts. ___ (9)

(g) Assistants in public defenders' offices, if established.___ (10)

(h) Other. (Please explain below) ___ (2)

4. If you favor an internship program, which of the following would you most prefer:

(a) A summer program between the second and third years of law school in which students would be assigned full time to one of the above work areas enumerated in Question 3.___ (8)

(b) A fifth semester program in which students would be assigned full time to one of the above work areas enumerated in Question 3.___ (9)

(c) A part time program for second and third year students to be integrated into the regular Law School curriculum.___ (1)

(d) Other. (Please explain below) ___ (1)

5. If you favor an internship program, should it be required___ (10) or elective___ (6) ?

6. Twenty-one (21) jurisdictions (including Florida, Georgia, Tennessee and Texas) presently allow students in advanced stages of law school to practice in certain limited circumstances and under highly supervised programs. Do you favor such a practice in Mississippi? Yes___ (11) No___ (5) (if no, please explain below)

7. Comments.

DO COLLEGE STUDENTS HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO HEAR OUTSIDE SPEAKERS?*

Introduction

The right or lack of right of an outside speaker to address students on college campuses has been discussed and analyzed by both legal scholars and judges. However, such close attention has not been given to what may be called "the right of the students to hear" such outside speakers. The purpose of this comment is to discuss the existence of that right. The discussion will be limited to a study of the right of public college and university students to hear talks given by guest speakers who have been invited by student organizations which have been given official recognition by the school administration.

A hypothetical situation will be used as a basis for the discussion of this matter. On January 19, 1969, the Hydrophonics Society of Anywhere University, a state university, invited X, a well-known expert in the field of hydrophonics, to address the annual conference of its members. In accordance with university regulations, the Society filed the proper application with university officials requesting permission to use a certain campus facility for the meeting at which X was to deliver his speech. Upon review of the request, the university officials granted permission to the Society to use the facility for the meeting, but they denied X permission to speak. As is true in many situations, X did not feel compelled to challenge this denial through judicial proceedings. However, a class action was filed on behalf of the members of the Society and other aggrieved members of the student body. The hypothetical situation thus brings into focus the issues to be discussed in this paper.

I. Standing

In a case strikingly similar to the above hypothetical, a group of students were held to have standing to sue when the speaker himself did not see fit to do so.[1] The court there said:

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* Editor's Note: The subject of this comment takes on added importance in light of Stacy v. Williams, No. WC 6725-K (5th Cir., Dec. 1, 1969), in which a three judge federal court struck down as unconstitutional regulations for off-campus speakers adopted by the Board of Trustees of the Institutions of Higher Learning of the State of Mississippi.

[1] Snyder v. Board of Trustees of Univ. of Ill., 286 F. Supp. 927 (N.D. Ill. 1968). This was a class action brought on behalf of all students at the University of Illinois. An officially recognized student organization invited a member of the Communist Party of the United States to speak to the group. The Board of Trustees of the University required written assurances from the organization that the speaker would not "advertise or publicize the subversive and seditious activities of the Communist Party, U.S.A., and that . . . no violation of law will occur in connection with the speech."

> In the First Amendment area, where traditional notions of standing have often been relaxed in order to vindicate rights of free speech and association, rights which have always been jealously protected by the Courts, we see no reason why the audience should be precluded from asserting their interests, merely because the speaker is disinclined to wage a legal battle. . . . As long as the interest of the plaintiffs as members of an audience is not merely hypothetical, but is part of an actual controversy in which a law has adversely affected the right to speak and to listen, the audience has standing to challenge a legislative enactment restricting free speech.[2]

Thus the court in this case of *Snyder v. Board of Trustees*, in discussing the right of the plaintiffs to hear the speaker, addressed itself primarily to the issue of *standing* to file suit to protect that right rather than to a constitutional discussion of the right to hear. It found a first amendment right to hear which gave the plaintiffs standing to protect that right in court. However, the first amendment does more than give standing to file suit to protect the right to hear. The first amendment itself protects the right to hear.

II. First Amendment Right

The right to speak and the right to hear co-exist. These are not two rights which are actually distinguishable—they are inseparable. One would be meaningless without the other. In cases similar to the above hypothetical, courts across the land are overturning denials of permission by school officials to speakers to accept invitations to speak on campuses.[3] The stated basis for most of these decisions is that the denial violated the speaker's first amendment right to speak.

Concededly, a speaker may argue that refusing to permit him to speak while other speakers have been granted permission amounts to a denial of equal protection of the law. However, this is not to say that all speakers have a constitutionally protected right to speak on university campuses. The university is established by taxpayers for the purpose of providing an education for those who enroll. Unlike a public park, court house lawn, or other public property, a university is not an open forum for outside speakers. Outside speakers are not a part of the public university and any right acquired by them to speak

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Plaintiffs refused to give such assurances and, consequently, the Board refused to let the speaker give his lectures. *See also, Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1133 (1968).

[2] Snyder v. Board of Trustees of Univ. of Ill., *supra* note 1, at 932.

[3] Baggett v. Bullitt, 377 U.S. 360 (1964); Brooks v. Auburn Univ., 296 F. Supp. 188 (M.D. Ala. 1969); Stacy v. Williams, Civil No. WC 6725-K (N.D. Miss., Jan. 20, 1969); Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968); Synder v. Board of Trustees of Univ. of Ill., *supra* note 1.

there would seem logically to arise out of a policy of the university by which speakers are invited to the campus to speak. This leads to the focal point to be made by this paper—the solution to the questions regarding outside speakers should not be grounded upon the rights of the speakers but more firmly upon the rights of the students to hear those speakers.

The idea that the first amendment protects the right of students to hear certain guest speakers has the support of case law as well as some legal scholars. In 1965, the United States Supreme Court handed down two decisions in which such support can be found. In *Lamont v. Postmaster General*[4] the Court was concerned with the right of an addressee to receive foreign Communist propaganda through the mail. Pursuant to an act of Congress,[5] the Postmaster General was required to retain and deliver such mail only upon the addressee's request. The Court held that an addressee had an unfettered right to receive mail which is protected by the first amendment. The requirement that the addressee sign a request card in order to receive the mail amounted "to an unconstitutional abridgment of the addressee's first amendment rights."[6] In the concurring opinion, Justice Brennan went further in discussing this point:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from Congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. (citations omitted) I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.[7]

In *Griswold v. Connecticut*[8] the Court pointed out that:

> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (Citation omitted) and freedom of inquiry, freedom of thought, and freedom to teach (Citation omitted)—indeed the freedom of the entire university community. (citations omitted) Without those peripheral rights the specific rights would be less secure.[9]

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[4] 381 U.S. 301 (1965).

[5] Postal Service and Federal Employees Salary Act of 1962, 39 U.S.C. § 4008(a) (1964).

[6] Lamont v. Postmaster General, 381 U.S. at 307.

[7] *Id.* at 308

[8] 381 U.S. 479 (1965).

[9] *Id.* at 482.

Since the Court in the two above analogous cases explicitly held that a person has a first amendment right to receive mail or information without governmental interference, logically it would seem to follow that the right to hear is at least as important and should be accorded the same protection. The same conclusion was reached by another writer.[10]

> But liberty of expression occupies a preferred place in our scheme of values . . . . In the case of the university, society's interest in free and open debate, including the rights of assembly, association, and publication and the right of all to hear and speak even unpopular ideas is particularly strong—the university is needed as a source of the new ideas which a democracy constantly requires.[11]

Policy reasons for protecting the rights of students to hear outside guest speakers are persuasive. The basic purpose of a college or university is to promote learning. Broad as this term is, it would seem to include the right of the student to inquire, to explore, to think, to hear and to delve uninhibited into matters which interest him intellectually. This quest for knowledge should not be restricted to the classroom situation. Professors are admittedly qualified in their respective fields. However, they are still individuals with points of view, biases, and prejudices. Even the most learned scholar may present a subject to his students in only one light—that being his point of view. To supplement the knowledge gained in the classroom, students should be allowed—even encouraged—to continue the pursuit outside the classroom. Study groups, organizations and outside guest speakers may sometimes offend the university administration and society because the ideas discussed go beyond the classroom inquiry and enter various controversial fields or because an unpopular person is the speaker. Disallowing this type of uninhibited thought violates the basic principle of education because such action restricts the right to learn.

During the years spent in college, an individual approaches maturity in thought. This maturity is usually accompanied by the development of new ideas based upon independent thought. To allow the individual to think independently and freely he must be guaranteed access to as much information about whatever he happens to be studying or thinking about as possible. The ability of an adult to think and develop rational and mature thoughts cannot be acquired from anything less than exposure to all the arguments relevant to a particular matter. To deny the college student the right to sift all the issues is to deny him an important part of the education he seeks. By the same

[10] *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L. J. 1362 (1963).

[11] *Id.* at 1397.

token, to deny a college student the right to hear a guest speaker, as was done in the hypothetical at the beginning of the comment, places an unreasonable restriction upon his right to learn. The unavoidable implication of a denial to college students of the right to outside information such as would be provided by an invited guest speaker is that the students have not gained sufficient maturity to intelligently weigh and consider the point of view presented by such a speaker. Since the college environment is a stimulus to mature, searching thought, most college students would be more prone to scrutinize very closely the opinions and ideas presented by outside speakers than would most adults outside the educational community.

Professor Van Alstyne has stated the proposition succinctly:

> Statements of student academic freedom ordinarily have laid understandable stress on affirmative, substantive rights. Generally, these statements have agreed that the hard core of student academic freedom is "freedom to learn." From this common point, various degrees of recognition and emphases are then extended to other rights in terms of their dependence upon this central one, e.g., the right to hear, to study, to write, to discuss, to experience, to explore, and to exercise rights of citizenship.[12]

Two recent court decisions indicate a beginning by the judiciary to give effect to the arguments favoring the protection of the right of students to hear guest speakers. In the previously mentioned *Snyder* case the court recognized that:

> There is a First Amendment right to peacefully assemble to listen to the speaker of one's choice, which may not be impaired by state legislation any more than the right of the speaker may be impaired.[13]

The most thorough discussion and examination of this right is given by the court in *Brooks v. Auburn University*.[14] In this case the plaintiffs, students of an officially recognized student organization and faculty members of Auburn University, sought a preliminary injunction restraining university officials from interfering with a proposed speech at Auburn by Reverend William Sloane Coffin, a controversial person of national prominence. The student organization had requested money from the Public Affairs Seminar Board to finance the speech. The board

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[12] Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 L. IN TRANS. Q. 1, 18 (1965).

[13] Snyder v. Board of Trustees of Univ. of Ill., *supra* note 1, at 932.

[14] Brooks v. Auburn Univ., 296 F. Supp. 188 (M.D. Ala. 1969), *aff'd*, No. 27316 (5th Cir., July 8, 1969).

approved the request, but was then told by the president of Auburn that the Reverend Mr. Coffin would not be permitted to speak because he was a convicted felon and he might advocate breaking the law. The rules promulgated by the president concerning guest speakers would then be violated. Prior to Coffin's invitation there had been no announced guidelines for inviting speakers to Auburn, even though several controversial figures had made speeches there at Auburn's expense within the last few years. At the outset, Judge Johnson made clear his approach to the case:

> . . . it is not considered necessary or even appropriate to a disposition of the issues in this case to deal with or discuss the legal rights of the Reverend Mr. Coffin to speak at Auburn University without an invitation. Rather, this case involves the rights of students and faculty to hear a speaker invited to the campus by them according to the University's authorized procedures.[15]

The court went on to point out the importance of an open forum on campus and quoted from *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) to support its contention. In that case, the United States Supreme Court stated:

> The essentiality of freedom in the community of American universities is almost self-evident. * * * Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[16]

In closing his opinion, Judge Johnson very strongly asserted a a person's first amendment right to hear when he said, quoting Alexander Meikeljohn, "The denial of that right to hear . . . is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.[17]

This case was appealed to the United States Fifth Circuit Court of Appeals, and the court, in affirming Judge Johnson's decision, held:

> The decree, entered on complaint of plaintiffs who were students and members of the faculty at Auburn, rested on the premise that Dr. Philpott was denying them their First Amendment right to hear the speaker. The First Amendment, applicable to a state university through the Fourteenth Amendment, embraces the right to hear.[18]

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[15] *Id.* at 191.

[16] *Id.* at 192.

[17] *Id.* at 199.

[18] Brooks v. Auburn Univ., No. 27316 (5th Cir., July 8, 1969).

Conclusion

It is not asserted that the right to hear is absolute. As is the case with all constitutional rights, it is subject to certain limitations and restrictions. However, since it is a constitutionally guaranteed right, it should be more jealously guarded than other rights not arising under the Constitution.

In determining the rights of the public university to regulate guest speakers, it is recognized that the university officials have the power to regulate certain procedural matters such as scheduling time, place and manner of speaking in order to avoid disrupting regularly scheduled campus activities. The exercise of this power does not run afoul of any constitutionally protected right, because no one is denied the exercise of such rights. Indeed, reasonable regulations are necessary to insure the attainment by the college student of the ultimate benefit of the educational institution.

Speaking within the limited context of the original hypothetical, it is submitted that Anywhere University can refuse X permission to speak *only* if it can be established that he will in his speech advocate immediate acts of violence or any other activity which would disrupt the normal educational functions of the university.

In the past, courts have discussed the problem of college speaker prohibitions from the standpoint of the speaker's right to speak or the university's right to regulate such speech. It is submitted that the real issue in this area is the right of the student to *hear*, and that the federal district court in *Brooks* was correct in its recognition of this right.

Joseph L. McCoy
Roger T. Clark

RECENT DEVELOPMENTS OF THE UNSEAWORTHINESS DOCTRINE IN THE FIFTH CIRCUIT

Introduction

The U.S. Fifth Circuit Court of Appeals has a heavy caseload of admiralty claims and the purpose of this comment is to provide the reader with an insight into this circuit's trend in the unseaworthiness area. Primary reliance will be placed on recent decisions of the fifth circuit relating to the present expansion of the peculiar doctrine of unseaworthiness. There will be little or no discussion of prior law trends, and no explanation or definition of procedures or phrases unknown to the Civil Law. Due to the heavy caseload and the potential for future admiralty cases, the fifth circuit should be a trendsetter in the field of admiralty law.

I. Historical Background and Development of the Unseaworthiness Doctrine

An injury may give a seaman three causes of action against his employer-shipowner. These causes are: (1) for maintenance and cure; (2) for damages based on negligence and the Jones Act,[1] and (3) for damages based on the maritime doctrine of strict liability for unseaworthiness of the vessel. Unseaworthiness as it relates to personal injuries is not a well defined area. The doctrine of unseaworthiness resulting in personal injuries is believed to have originated in the dictum contained in the now famous case of *The Osceola*[2] in 1903. In this case Justice Brown stated:

> The vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.[3]

Immediately following this opinion, the shipowner's liability for unseaworthiness was said to be based on negligence,[4] but later dicta in *Carlisle Packing Co. v. Sandanger*[5] and *Mahnich v. Southern S. S. Co.*[6] seemed to consider the duty as absolute. In *Mahnich* the court gave recovery to a crewman for the owner's failure to provide a sea-

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[1] 46 U.S.C. § 688 (1964).

[2] 189 U.S. 158 (1903).

[3] *Id.* at 175.

[4] The Henry B. Fiske, 141 F. 188 (D. Mass. 1905). *See* Tetreault, *Seaman, Seaworthiness, and the Rights of Harbor Workers,* 39 Cornell L.Q. 381, 391-92 (1954).

[5] 259 U.S. 255 (1922).

[6] 321 U.S. 96 (1944).

worthy vessel and seaworthy appurtenances. The libelant Mahnich was injured by the parting of a rope used to rig a staging. The Supreme Court viewed this accident as a case of absolute liability because of the defect; the fact that a mate was negligent in selecting defective rope would be irrelevant, as would the issue of whether the defect was discoverable. Thus, the liability results without proof of negligence.

Before *Mahnich* the great danger in any unseaworthiness action was that the case would be dismissed if the proximate cause of any injury was found to be operating negligence rather than the defective nature of the equipment or appliance. After *Mahnich* no amount of negligence was fatal, provided the libelant could find some aspect of unseaworthiness to rely upon.

In 1946, the Supreme Court in *Seas Shipping Co. v. Sieracki*[7] extended the doctrine of unseaworthiness to longshoremen and shoreworkers doing work that was formerly done by seamen while aboard the vessel which was in navigable service. The doctrine was extended on the theory that the liability arises from performing the ship's service with the owner's consent, and one who performs the seamen's services should receive the protection of a seaworthy vessel.[8] After *Sieracki*, and particularly during the last fifteen years, there has been a multitude of cases dealing with the question of unseaworthiness. The doctrine again was greatly expanded by *Pope and Talbot Inc. v. Hawn*[9] in 1953, which extended the *Sieracki* doctrine to all other harbor workers not considered stevedores.

The third circuit in *Mesle v. Kea S. S. Corp.*[10] attempted to categorize the types of situations encompassed in the seaworthiness doctrine. The opinion notes the category by which the shipowner is made absolutely liable for failure to supply proper equipment to those who the owner knows will be aboard for a particular activity of a maritime nature. The other species of liability attaches because the equipment used on behalf of the owner is "incapable of performing its function in the manner for which it is designed."[11]

The fifth circuit has given the doctrine a liberal construction. In *Cox v. Esso Shipping Co.*[12] the court held that:

> [T]he owner has an absolute duty to furnish reasonably suitable appliances. If he does not, then no amount of due care of prudence excuses him, whether he knew or could have known,

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[7] 328 U.S. 85 (1946).

[8] 1 M. Morris, The Law of Seamen 121 (2d ed. 1962).

[9] 346 U.S. 406 (1953).

[10] 260 F.2d 747 (3d Cir. 1958), *cert. denied*, 359 U.S. 966 (1959).

[11] *Id.* at 751.

[12] 247 F.2d 629 (5th Cir. 1957).

> of its deficiency at the outset or after use. In contrast, under the negligence concept, there is only a duty to use due care, i.e. reasonable prudence to select and keep in order reasonably suitable appliances.[13]

The court further held that "the vessel is under the absolute duty to supply and keep in order tools and appliances, must furnish a seaworthy ship and seaworthy appliances. . . . The obligation to furnish the gear was on the vessel."[14] The fifth circuit refined the term in *Vickers v. Tumey*[15] by holding that seaworthiness imposed an absolute duty on the shipowner to furnish reasonably suitable appliances. This doctrine is to be distinguished from the theory of a reasonably safe place to work, which imposes only a duty of reasonable care to furnish reasonably suitable appliances. The court defined the doctrine as follows:

> Seaworthy . . . means that under the circumstances existing at the time of the injury, the vessel and her equipment . . . were reasonably fit to perform the duty of safety, which this vessel owed to human beings aboard her, and to perform duties for which they were intended.[16]

The duty to furnish a safe and seaworthy vessel, appliances, appurtenances, and equipment is an absolute non-delegable duty.[17] The fifth circuit recently stated that "seaworthiness is a relative concept, depending in each instance on the particular circumstances. The owner owes an absolute duty to provide a seaworthy vessel; however the absolute duty is only to furnish a vessel and equipment reasonably fit for their intended use."[18] Thus it is impossible to formulate an exact rule regarding classification of what is or is not unseaworthiness, but each case and its particular factual situation must be weighed separately with a balancing of interest.

II. Basis of the Doctrine

The duty of seaworthiness has been compared to a contractual warranty.[19] It has also been stated that the duty arises from the mari-

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[13] *Id.* at 636.

[14] *Id.* at 635-36.

[15] 290 F.2d 426 (5th Cir. 1961).

[16] *Id.* at 433 n.5.

[17] Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Boudin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955); Pope and Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), *aff'd*, 347 U.S. 396 (1954).

[18] Gibbs v. Kiesel, 382 F.2d 917-18 (5th Cir. 1967); citing Marshall v. Oue Skou Rederi A/S, 378 F.2d 193 (5th Cir. 1967).

[19] LeGate v. The Panamolga, 221 F.2d 689 (2d Cir. 1955).

time status and unusual dangers of the sea, rather than from a contract in any true sense, although the shipowner by consenting to have the seaman serve him consents to an obligation to provide a seaworthy ship. The relationship gives rise to an implied warranty between the owner and seaman.[20] The origin of the doctrine is really unknown and "perhaps unascertainable."[21]

Thus it is evident that the shipowner has a non-delegable duty to provide a tight ship, adequate and safe appliances, and a safe place for the seaman to work and to go about his other shipboard activities. Otherwise he is liable for injury without regard to his own fault.

III. Negligence and Unseaworthiness Combined

Negligence and unseaworthiness concepts meet if there is a failure to provide a safe place in which to work. As a negligence concept, the common law required an employer to furnish safe appliances and a safe place to work, which led to liability if not observed; to this the fellow servant rule was not a defense.[22] Lack of due care may create a dangerous place to work because of the creation of an unseaworthy condition. This latter view was the basis for maritime indemnity suits prior to the Jones Act.[23] It has been stated that the employer-shipowner need use only reasonable care to provide a safe place to work, and that there is no absolute duty if the ship is seaworthy.[24] A defective appliance that causes injury results in unseaworthiness, even though the defect in the appliance need not make the whole vessel unseaworthy.[25]

A seaman may seek a remedy for unseaworthiness under the general maritime law and the Jones Act in the same suit without being required to elect upon which theory he is proceeding. It is said that these claims are only alternative grounds of recovery for a single cause of action.[26] The election that is required by the Jones Act is merely one between a civil action and a suit in admiralty.[27] A claim based solely on the general maritime law (seaworthiness) may not be brought on the law side of the federal court unless there is diversity of citizenship and the requisite jurisdictional amount involved.[28]

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[20] Stricka v. Netherlands Ministry of Traffic, 185 F.2d 555 (2d Cir. 1950), *cert. denied*, 341 U.S. 904 (1951), citing Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[21] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 91 (1946).

[22] Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

[23] *See* The Frank and Willie, 45 F. 494 (S.D.N.Y. 1891).

[24] Pederson v. The Bulklube, 170 F. Supp. 462 (E.D.N.Y. 1959).

[25] McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958).

[26] *Id.*

[27] McAfoos v. Canadian Pacific S.S., Ltd., 243 F.2d 270 (2d Cir. 1957).

[28] Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

IV. The Fifth Circuit and Unseaworthiness

A. Problems of Burden of Proof

The fifth circuit stated in *Gibbs v. Kiesel*[29] that "seaworthiness is a relative concept, depending in each instance on the particular circumstances. The owner owes an absolute duty to provide a seaworthy vessel; however, the absolute duty is only to furnish a vessel and equipment reasonably fit for their intended use."[30] This circuit has approved the application of *res ipsa loquiter* to an action for unseaworthiness, noting that the logical inference is often that the gear or appurtenance would not have broken had it not been defective.[31] The cases have held that unseaworthiness is a question of *fact* and rarely should be determined as a question of law.[32] Since unseaworthiness is a question of fact, each case must be considered on its own factual situation in order to ascertain whether or not the vessel was unseaworthy at the time of the injury.

It is generally held that the burden of proof is on the libelant to show that the injury was caused by the unseaworthiness.[33] The maritime law does not recognize the harsh doctrine of contributory negligence as being a bar to recovery, but does recognize the concept of comparative negligence. The comparative negligence of admiralty is generally computed on the same basis as the civil law computes the division of negligence. The courts have held that the shipowner has the burden of proving contributory negligence in order for the doctrine of comparative negligence to be applied.[34] The courts consistently hold that there are no precise standards which can be applied to determine the proportion in which a plaintiff's negligence contributes to the happening of the accident.[35]

B. Fitness of Crew

Holmes v. Mississippi Shipping Co.[36] is an interesting case which held that a seaman who deliberately injures himself cannot hold the

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[29] 382 F.2d 917 (5th Cir. 1967). *See also* Vickers v. Tumey, 290 F.2d 427 (5th Cir. 1961).

[30] 382 F.2d at 918.

[31] Gibbs v. Kiesel, 382 F.2d 917 (5th Cir. 1967).

[32] Jefferson v. Taiyo Katun, K.K., 310 F.2d 582 (5th Cir. 1962).

[33] Todd v. Peninsular & Occidental S.S. Co., 326 F.2d 196 (5th Cir. 1963); Liberman v. Matson Navigation Co., 300 F.2d 661 (9th Cir. 1962); Quintero v. Sinclair Ref. Co., 311 F.2d 217 (5th Cir. 1962).

[34] Moore v. The O/S Fram, 226 F. Supp. 816 (S.D. Tex. 1963), *aff'd, sub nom,* Wilhelm Seafoods, Inc. v. Moore, 328 F.2d 868 (5th Cir. 1964).

[35] Louviere v. The Fidelity and Cas. Co., 210 F. Supp. 260 (W.D. La. 1962).

[36] 301 F.2d 474 (5th Cir. 1962).

vessel liable on the basis of unseaworthiness. Holmes, a seaman, chopped off his right hand at the wrist with a meat cleaver. The court stated that the seaman had previously acted in a normal manner and that there was no showing that he had either a "wicked disposition, a propensity of evil conduct, a savage and vicious nature, or that he was a homicidal maniac." Holmes was attempting to hold the vessel unseaworthy on the basis of an improperly manned vessel. Similarly, *June T. Inc. v. King*[37] held that a classic case of an unseaworthy vessel develops when a vessel is inadequately or improperly manned. Furthermore, the fifth circuit has held that a seaman's lack of experience may reduce the degree of contributory negligence chargeable to him,[38] and that a ship may be rendered unseaworthy by the failure of the shipowner to provide a competent crew.[39] The fifth circuit has expanded this doctrine and held that the shipowner owes a non-delegable duty to furnish a seaworthy vessel, and this duty extends to intermediary employees who are performing a portion of the ship's work.[40] Seaworthiness also requires that the crew's quarters be of the required standard, having, for example, proper ventilation.[41] The fifth circuit is following the general trend in expanding the owner's warranty of the fitness of the crew. One of the more far-reaching aspects of this warranty is illustrated in the case of *Boudin v. Lykes Bros. S. S. Co.*[42] where a seaman was subjected to a vicious attack by a fellow crewman, and the shipowner was held liable without proof of any prior notice of the attacker's disposition. Also, *Keen v. Overseas Tankship Corp.*[43] held that a crew member must be "equal in disposition" and seamanship to the ordinary man in the calling."[44] It has been said that if the officer or crew member who is guilty of an assault shows viciousness, there is no defense to the shipowner.[45] However, there is no liabilty for the usual assaults or fights expected of strong-minded sailors, but a vicious assault will result in unseaworthiness.[46] Another recent case that dramatizes the aspects of the duty to provide a competent crew is *Waldron v. Moore-McCormack Lines, Inc.*[47] In this case a vessel, which as a whole was fully manned and had on board a competent third mate, became

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[37] 290 F.2d 404 (5th Cir. 1961).

[38] Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464 (5th Cir. 1966).

[39] Price v. S.S. Yaracuy, 378 F.2d 156 n.160 (5th Cir. 1967).

[40] Robichaux v. Kerr McGee Oil Indus., Inc., 376 F.2d 447 (5th Cir. 1967).

[41] Evans v. Schneider Transp. Co., 250 F.2d 710 (2d Cir. 1957); Hern v. Moran Towing and Transp. Co., 138 F.2d 900 (2d Cir. 1943).

[42] 348 U.S. 336 (1955).

[43] 194 F.2d 515 (2d cir.), *cert. denied*, 343 U.S. 966 (1952).

[44] *Id.* 194 F.2d at 518.

[45] 1 EDLEMAN, MARITIME INJURY AND DEATH 160 (1960).

[46] Stankiewixz v. United Fruit S.S. Corp., 229 F.2d 580 (2d Cir. 1956).

[47] 386 U.S. 724 (1967).

unseaworthy when the third mate assigned two men, instead of three or four, to uncoil a heavy rope and carry it to the edge of the ship. The Supreme Court held that just as misuse by the crew of safe equipment can make a vessel unseaworthy, so can misuse of the crew by assigning too few to the job render that vessel unseaworthy. The court reasoned:

> This analysis, we believe, is required by a clear recognition of the needs of the seaman for protection from dangerous conditions beyond his control and the role of the unseaworthiness doctrine which, by shifting the risk to the shipowner provides that protection.[48]

The broad range of the humanitarian policy in longshoremen's cases of protecting maritime workers from the hazards of maritime service and of shouldering their losses alone, should prevent the shipowner from delegating, shifting, or escaping his duty by using employees of contracting stevedores or the contractor's equipment.[49]

The above reasoning is to be distinguished from the case in which the shipowner provides proper gear and an experienced longshoreman or seaman fails to use it. The fifth circuit has held that this type of nonfeasance is merely negligence on the worker's part and not unseaworthiness on the part of the vessel.[50] It has been held under certain circumstances that a seaman may be "under a duty to exercise ordinary care in selecting or choosing one tool over another . . . ."[51]

C. Transitory Unseaworthiness

The Supreme Court in *Mitchell v. Trawler Racer Inc.*,[52] a 1960 decision, continued the trend toward absolute liability for seamen's injuries resulting from unseaworthiness by holding the duty of seaworthiness to be absolute even in the case of transitory unseaworthy conditions arising after the beginning of the voyage. Justice Stewart in the majority opinion held that liability for temporary unseaworthy conditions is no different from the liability resulting when the conditions are permanent. The vessel in the instant case was held to be unseaworthy due to the presence of slime or fish gurry on the rail, even though it had been present for only a short while. The court realistically stated, however, that the standard is "not perfection, but reasonable fitness . . . ."[53]

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[48] *Id.* at 728.

[49] *Id.*

[50] Taylor v. Helen Lykes, 402 F.2d 777 (5th Cir. 1969).

[51] Hussein v. Isthmian Lines, Inc., 405 F.2d 946 (5th Cir. 1968).

[52] 362 U.S. 539 (1960).

[53] *Id.* at 550.

It is submitted that the courts should proceed with caution in this area since the instant case could in reality make the shipowner an insurer of his employees. In the cases of *Poignant v. United States*[54] and *Hildebrand v. United States*,[55] the second circuit early held that the owner is liable for an unseaworthy condition arising after the voyage starts. The Supreme Court probably realized the consequences of absolute liability for transitory unseaworthiness when it held that a condition created in loading a vessel may be too momentary to render the vessel unseaworthy.[56] Acting conservatively, the fifth circuit in *Keel v. Greenville Mid-Stream Service Inc.*[57] held that soap and water on a vessel's deck did not constitute unseaworthiness. However, a later decision by a Louisiana Federal District Court held that a transitory condition such as the temporary presence of oil, water, or other foreign substances will make the ship unseaworthy, just as does a permanent defect. The court reiterated that the shipowner's duty to furnish a seaworthy ship is absolute.[58]

It has been consistently held that the shipowner's duty to furnish a seaworthy vessel is absolute and non-delegable and is a type of liability without fault and may be violated without regard to negligence.[59] The Jones Act requires the shipowner to exercise reasonable care and is based on negligence concepts, but this duty should be distinguished from the absolute duty of seaworthiness. Unseaworthiness should not be confused with maintenance and cure since a ship has a duty to provide maintenance and cure to any of its seamen who are injured or become ill while in the service of the ship.[60] *Haskins v. Point Towing Co.*[61] held that claims for unseaworthiness and maintenance and cure and negligence claims under the Jones Act may be heard together.

D. Custom and Practice

Another interesting question in determining unseaworthiness is whether the custom and practice of a particular operation is viewed as evidence of a ship's seaworthiness. The fourth circuit in *Bryant v. Partenreederei-Ernest Russ*[62] held that custom and practice may be used as evidence, but it is not conclusive. The fifth circuit in two recent cases appeared to give conflicting views. In *Coleman v. Jahncke Service*

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[54] 225 F.2d 595 (2d Cir. 1955).
[55] 226 F.2d 215 (2d Cir. 1955).
[56] Morales v. City of Galveston, 370 U.S. 165 (1962).
[57] 321 F.2d 903 (5th Cir. 1963).
[58] Halem v. Bloomfield S.S. Co., 226 F. Supp. 380 (E.D. La. 1964).
[59] Hussein v. Isthmian Lines, Inc., 405 F.2d 946 (5th Cir. 1968).
[60] Central Gulf S.S. Corp. v. Sambula, 405 F.2d 291 (5th Cir. 1968).
[61] 395 F.2d 737 (4th Cir. 1968).
[62] 330 F.2d 185 (4th Cir. 1964).

Inc.[63] the vessel was held unseaworthy for having a faulty compass, even though the use and rudiments of compass compensation and correction were not widely practiced. But *Smith v. M/V Gisna*[64] held that the vessel was not unseaworthy when the usual method of loading the cargo in question was used. It is submitted that the determination of whether a vessel is reasonably fit *should* require some comparison with the equipment of other ships and the custom and practice of the trade, since the owner is not an insurer and is not required to produce an accident-proof ship.[65] However, it has been held that it is improper to charge a jury that the owner is not liable for an unavoidable accident, since there is a non-delegable duty and notice or knowledge of a defect are irrelevant.[66]

V. Shore-Based Workers

One important point that should not be overlooked is that it is immaterial whether the injured person is a seaman or whether he was doing longshoreman's work or other harbor workers' work at the time of injury if the vessel was unseaworthy. The question is whether he fits the *Seiracki* definition of humanitarian policy—in service—traditional work of seaman, etc. The shipowner is liable for an injury proximately caused by the vessel's unseaworthiness whether the injured party had the status of one or the other.[67] However, the warranty of seaworthiness extends to shore-based workers only at the time when the vessel is ready for the water. For example, a dead ship is not covered by the doctrine.[68]

However, the fifth circuit's position on this area is apparently contrary to that of the various other circuits.[69] The court in *Moye v. Sioux City & New Orleans Barge Lines, Inc.*[70] held that surrender of a barge to a repairing agency for nineteen hours for minor repairs was enough to defeat both the claim of unseaworthiness and negligence in failure to furnish a safe place to work. It is submitted that the court misconstrued the doctrines of "in navigation" and "in control" by denying recovery to the injured shore-based workers. It is submitted that the courts should follow the Supreme Court's lead in providing "humanitarian" protection of the warranty of seaworthiness to all engaged in

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[63] 341 F.2d 956 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966).

[64] 362 F.2d 164 (5th Cir. 1966).

[65] Phipps v. NV Neder. Amerik. Stoorm, Maats, 259 F.2d 143 (9th Cir. 1958).

[66] Yanouw v. Weyerhaeuser S.S. Co., 250 F.2d 74 (9th Cir. 1957), *cert. denied*, 356 U.S. 937 (1958).

[67] Clevenger v. Star Fish & Oyster Co., Inc., 325 F.2d 397 (5th Cir. 1963).

[68] Alfred v. M/V Margaret Lykes, 398 F.2d 684 (5th Cir. 1968).

[69] *See* Note, *Admiralty—The Problems of "In Navigation" and "In Control" for the Injured Shore-Based Worker*, 40 Miss. L.J. 445 (1969).

[70] 402 F.2d 238 (5th Cir. 1968).

maritime service, and that the doctrine of control should not be construed as a rigid test in determining recovery. It is further submitted that the "humanitarian" trend should continue since the loss may be spread through the party who is most able to spread the loss throughout the industry.

VI. Maritime Torts Resulting in Death

At common law there was no right to recovery for a maritime tort which resulted in death. The Death on the High Seas Act[71] provides a right of recovery when the tort occurs on or over the high seas "beyond a marine league" from shore. When the tort occurs aboard a vessel in a state's territorial waters, or within the three-mile limit, and when no specific federal statute is applicable, the state's wrongful death act may be relied upon to supplement the maritime law. One problem in this area is whether the state's wrongful death act furnishes only the right or whether it also governs the remedy in the substantive law to be applied. This question apparently was answered by the Supreme Court (5-4) in *Tungus v. Skovgaard*,[72] in which the third circuit held that admiralty must look to the state wrongful death statute to supplement the general maritime law and must also follow the state court's construction of the wrongful death statute. The Supreme Court affirmed this view, while the dissent said that the shipowner's duties were created by federal maritime law while the wrongful death act gave only the right to sue, since that right did not exist under the general maritime law.

It is generally stated that where the law of the state is that contributory negligence absolutely bars recovery, that rule prevails as against the comparative negligence doctrine of admiralty.[73] The fifth circuit has followed this view and has said that "so long as the *Tungus* standard remains, it is a question of state law."[74] However, there may be a trend to apply the general maritime law in order to vitiate the harsh rule of contributory negligence.[75] The fifth circuit has also held that the conduct that gave rise to liability is to be measured by the

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[71] 46 U.S.C. § 761-67 (1964).

[72] 358 U.S. 648 (1959).

[73] 2 Am. Jur. 2d *Admiralty* § 18 (1962).

[74] Emerson v. Holloway Concrete Prod. Co., 282 F.2d 271, 286 (5th Cir. 1960). For cases where contributory negligence has been a bar to admiralty death actions occurring within territorial waters of Louisiana *see* Quinette v. Bisso, 136 F. 825 (5th Cir.), *cert. denied*, 199 U.S. 606 (1905); Hornsby v. Fishmeal Co., 285 F. Supp. 990 (W.D. La. 1968); Byrd v. Napoleon Ave. Ferry Co., 125 F. Supp. 573 (E.D. La.), *aff'd on op. below*, 227 F.2d 958 (5th Cir. 1954), *cert. denied*, 351 U.S. 925 (1955).

[75] Hornsby v. Fishmeal Co., 285 F. Supp. 990 (W.D. La. 1968).

substantive standards of state law, although the state's substantive law will not be enforced if it detracts from rights created by the federal maritime law.[76] It is submitted that the courts will uphold the supremacy of the federal maritime law in order to further the "humanitarian" goals of admiralty. It seems very unrealistic to allow a seaman to recover if he is injured, but not to allow recovery if he is killed. This, however, often happens when contributory negligence is treated as an absolute bar to recovery. Conformity and supremacy will be accomplished if the Supreme Court will rule that state law determines the right to sue and that the general maritime law controls as to the remedy.

Conclusion

It is essential that negligence and unseaworthiness be distinguished. Negligence involves the familiar concept of due care in the owner's and crew's operation of a vessel and notice of any defects of the vessel and its furnishings. Unseaworthiness relates to the duty undertaken or warranty given by a shipowner that the vessel and its appurtenances are reasonably fit for its intended use. The standard is not perfection but reasonable fitness. This duty is non-delegable, and whether the vessel is reasonably fit is a question of fact. Notice of the defect is not required. The concept of unseaworthiness has led to a major uncertainty between the various judges and courts that have grappled with the problem.

It is submitted that the courts have developed the doctrine of unseaworthiness to a point where what used to be considered negligence is now treated as unseaworthiness. Although the courts strongly assert that the shipowner is not an insurer, it is increasingly evident that the law is rapidly construing the doctrine of unseaworthiness to mean that the shipowner is insuring the safety of all who come into contact with the ship. The courts appear to be constantly expanding this doctrine of unseaworthiness and the "humanitarian" approach of recovery for the injured worker. It is possible to analogize the courts' handling of unseaworthiness to that of land-based employees under workmen's compensation statutes. The Supreme Court appears to rely heavily on the risk distribution theory in holding the shipowner liable.[77]

While no attempt is made here to pass judgment on this expanding theory of "insurability," it is submitted that the fifth circuit is not following the lead of the Supreme Court and the other circuits in this

[76] Kenny v. Trinidad Corp., 349 F.2d 832 (5th Cir.), *cert. denied*, 382 U.S. 1030 (1965).

[77] *See generally* Comment, *Risk Distribution and Seaworthiness*, 75 YALE L.J. 1174 (1966).

field. The fifth circuit follows the more traditional view of unseaworthiness and has not given "blanket" recovery to the injured workman. The fifth circuit has a heavy caseload of admiralty matters, and this circuit should conform to the prevailing views of the Supreme Court and the various other circuits, even to the extent of giving consideration to risk distribution and the humanitarian aspect of unseaworthiness.

Ernest Lane, III

STUDENT NOTES

Zoning—an Analysis of "Spot Zoning" in Mississippi Rezoning Cases

> [N]o discussion of the amendment of zoning ordinances or the right of the municipality to so amend them could be undertaken intelligently without a clear and distinct reference to a most vicious practice that has expanded almost to a point where it has become a cancerous growth on the body politic in many, many municipalities of the land, an evil generally denominated as "spot zoning" or "piecemeal zoning."[1]

Introduction

The above opinion would lead one to assume that the practice of "spot zoning" is carried on in large measure throughout the land. From the author's reaction one would expect to find innumerable court decisions in all states invalidating zoning ordinances and amendments as being "spot zoning." But such is not always the case. Many states, indeed, do have a number of decisions in this field. In Mississippi, however, there seemingly is a reluctance on the part of our supreme court to invalidate an ordinance or amendment as being "spot zoning." The result in every instance has been a striking down of the ordinance on some ground other than "spot zoning."

I. Requirements for Rezoning

Mississippi municipalities have statutory authority to zone and rezone. The Mississippi Code provides that municipalities may regulate, *inter alia,* the use of lots within their boundaries[2] by passing zoning regulations and may from time to time change those regulations.[3] Although the statute itself imposes no requirements, our court through the years has imposed several conditions for valid rezoning. The primary source of rezoning requirements is the case of *City of Jackson v. Bridges.*[4]

Perhaps the prime consideration in rezoning is that it must be shown that there was some mistake in the original zoning or that the conditions in the neighborhood have changed to the extent that rezoning is warranted.[5] It is the determination of the zoning authorities that such change of conditions exists or that there was some mistake in the original zoning that is usually controlling, and such determination will not be disturbed if it is fairly debatable.[6] In addition there must be a positive

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[1] E. Yokley, Zoning Law and Practice § 82 (1948).

[2] Miss. Code Ann. § 3590 (Supp. 1968).

[3] Miss. Code Ann. § 3594 (Supp. 1968).

[4] 243 Miss. 646, 139 So. 2d 660 (1962).

[5] *Id. See also* C. Rhyne, Municipal Law § 32-2, at 822 (1957).

[6] Holcomb v. City of Clarksdale, 217 Miss. 892, 65 So. 2d 281 (1953). *See also* 62 C.J.S. *Municipal Corporations* § 228 (1) (1949).

showing of physical, economic or social change; aesthetic interests or group caprice do not justify the release of zoning regulations.[7]

The court has further held that " '[a]n organized neighborhood desire for rezoning, without more, is insufficient to justify rezoning.' "[8] Aesthetic conditions alone will not justify zoning regulations, and in those instances where such regulations are promulgated for the sole purpose of preserving the appearance of a designated neighborhood, they are invalid.[9]

In all cases the petitioners have the burden of proving a public need for the change.[10]

II. Spot Zoning—Definition

The above, then, are the basic requirements for valid rezoning.[11] As will be more fully developed, there are two uses of the phrase "spot zoning." There is legal "spot zoning" and illegal "spot zoning." It may be safely stated that any rezoning that does not meet the above requirements is in fact, illegal "spot zoning."[12] However, there are numerous more exact definitions of illegal "spot zoning."

"Spot zoning" has been described as "[a]n attempt to wrench a single small lot from its environment and give it a new rating that disturbs the tenor of the neighborhood . . . ."[13] It may further be described as "the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district."[14] The term may also apply to the reverse situation: "that is, one in which a single lot has burdens imposed upon it which are more rigid than those imposed upon other properties within the same district."[15]

The Mississippi Supreme Court has given the following definition:

> The term "spot zoning" is ordinarily used where a zoning

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[7] City of Jackson v. Bridges, *supra* note 4, at 656, 139 So. 2d at 664; City of Miami Beach v. First Trust Co., 45 So. 2d 681 (Fla. 1949).

[8] City of Jackson v. Bridges, *supra* note 4, at 655, 139 So. 2d at 663 *quoting* C. RHYNE, *supra* note 5, at 823.

[9] City of Jackson v. Bridges, *supra* note 4, at 656, 139 So. 2d at 664. *See also* 101 C.J.S. *Zoning* § 36 (1958).

[10] City of Jackson v. Bridges, *supra* note 4, at 665, 139 So. 2d at 664.

[11] For an excellent, concise outline of these requirements see Martinson v. City of Jackson, 215 So. 2d 414 (Miss. 1968).

[12] In point of fact one text writer's identification of situations where "spot zoning" is legal is: "(1) Where there is substantial change of conditions in the vicinity of the affected property. (2) Where the reclassification is made pursuant to a coordinated plan designed to promote zoning objectives. (3) Where the conditions or the character of the property itself distinguishes it from the surrounding property and shows a reasonable basis for different classification." 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 26-23 (3d ed. Supp. 1968).

[13] Linden Methodist Episcopal Church v. City of Linden, 113 N.J.L. 188, 173 A. 593, 595 (1934).

[14] 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 26-1 (3d ed. 1960).

[15] "The term 'spot zoning' would rarely be used in such a situation; here, the attack would be made on the ground of discrimination." *Id.* n.l.

> ordinance is amended reclassifying one or more tracts or lots for a use prohibited by the original zoning ordinance and out of harmony therewith. Whether such an amendment will be held void depends upon the circumstances of each case. The one constant in the case, . . . where zoning ordinances have been invalidated due to "spot zoning" is that they were designed "to favor" someone.[16]

This statement by the Mississippi Court reflects the nationwide concern with "spot zoning." The New York Court of Appeals in *Thomas v. Bedford* commented on the inevitable effect "spot zoning" had "of granting to a single owner a discriminatory benefit at the expense and to the detriment of his neighbors, without any public advantage or justification."[17]

III. Valid Spot Zoning

Clearly, there are instances where "spot zoning" is a valid exercise of the police power. Each case turns upon its own facts and circumstances.[18] "The relevant inquiry is sometimes said to be whether the particular zoning is accomplished for the benefit of an individual owner or whether it is pursuant to a comprehensive plan for the general welfare of the community; but the fact that only one tract of land or one owner is involved in a zoning change does not ipso facto make the rezoning illegal."[19]

In *McKibben v. City of Jackson*[20] property in the protestants' neighborhood had been rezoned from residential to limited commercial use. They unsuccessfully attacked the zoning as "spot zoning" in circuit court. The zoning was affirmed by the supreme court. "Not all amendments which change or alter the character of a use district fall within the category of 'spot zoning' as we generally understand the term."[21]

It would seem, then, that our court is willing to recognize valid "spot zoning." However, the question remains as to whether a rezoning amendment be stricken down as illegal "spot zoning."

IV. Sensitivity—One Explanation for Hesitancy in Condemning "Spot Zoning"

Rezoning can be and usually is a sensitive subject in the municipalities where such problems arise. Our court seems to recognize this. Most presumptions are in favor of the municipal authorities, and close questions are usually decided in favor of the municipality, thus reflecting a hands-off attitude in that regard. For example:

> Every zoning case must be decided on the basis of all the circumstances of the particular case. . . . If the question is fairly

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[16] McKibben v. City of Jackson, 193 So. 2d 741, 744 (Miss. 1967).

[17] 11 N.Y.2d 428, 435, 184 N.E.2d 285, 288 (1962).

[18] 8 E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.84 (3d ed. 1965).

[19] *Id.* at 232-33.

[20] 193 So. 2d 741 (Miss. 1967).

[21] *Id.* at 744.

> debatable, this Court will not disturb a zoning ordinance, *which is presumed to be valid.* (emphasis added).[22]

Similar statements appear in other cases: " 'The classification of property for municipal zoning purposes is a legislative rather than a judicial matter, . . . The courts will not set aside the municipality's classification if its validity *is fairly debatable,* but will do so only if its invalidity is clear.' "[23] The court has said that it will not "pass upon the wisdom or policy of a rezoning order" because that question is for the determination of the local authorities.[24] In *Martinson v. City of Jackson*[25] the court showed its respect for the actions of the original zoning ordinance. In that instance the petitioners sought to prove that the original zoning had been in error. "The officials so zoning cannot be presumed to have made a mistake; the presumption is to the contrary."[26]

This apparent judicial recognition of the sensitivity involved in zoning cases is reflected in the decisions in the area of "spot zoning." The court has thus far shied away from actually deciding a case on that issue. For example, in one of the most blatant of cases, *Lewis v. City of Jackson,*[27] the Colonial Country Club attempted to have some nine acres of its land rezoned from residential to commercial in order to erect a shopping mall. Over the objection of the appellants and against the recommendation of the Planning Board, the City Council granted Colonial's petition. This decision was affirmed by the circuit court, but on appeal the supreme court reversed:

> . . . [W]e prefer to defer any decision as to whether the so-called "spot zoning" is illegal under our zoning statute. . . . This case is controlled by the law announced in the case of *City of Jackson v. Bridges,* . . . and the authorities therein cited. We held in the *Bridges* case, supra, that the burden of proof was upon the petitioners seeking the change in a zoning ordinance to prove a public need for the change. . . . [Further] the proof must show that there was either some mistake in the original zoning or that conditions in the area had changed so as to warrant the rezoning.[28]

In spite of its reluctance to say so, it would appear that the court actually was striking down this zoning as being illegal "spot zoning." Regardless of what it is called, a spade is still a spade, and "spot zoning" is still "spot zoning."

Earlier the court in *Ridgewood Land Co. v. Simmons* had said: "We are of the opinion that although a zoning ordinance or amendment creates in the center of a large zone a small area or a district devoted to a different use, it is not spot zoning if it is enacted in accordance with

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[22] Howie v. Autrey, 209 So. 2d 904, 905 (Miss. 1968).

[23] Adams v. Reed, 239 Miss. 437, 445, 123 So. 2d 606, 609 (1960) *quoting* 62 C.J.S. *Municipal Corporations* § 228 (1949).

[24] Ridgewood Land Co. v. Simmons, 243 Miss. 236, 249, 137 So. 2d 532, 537 (1962).

[25] 215 So. 2d 414 (Miss. 1968).

[26] *Id.* at 416.

[27] 184 So. 2d 384 (Miss. 1966).

[28] *Id.* at 386.

a comprehensive zoning plan."[29] Further, in that case, the court specifically pretermitted a decision as to whether or not "spot zoning" is illegal under this state's zoning statutes.[30]

V. Another Explanation for the Court's Attitude— There is Really No Danger

In its most recent decision in this field, *Blacklidge v. City of Gulfport*,[31] the court ignored the appellants' assigning "spot zoning" as error. The City of Gulfport had rezoned a strip of Highway 90 as "residential-commercial." Appellants objected to the ordinance in that it was "arbitrary, unreasonable and capricious; *that the ordinance constituted spot zoning*; and that the ordinance is void because it contains two subject matters in violation of law . . . ."[32] (emphasis added). In a beautifully written opinion Mr. Justice Rodgers expressed the court's opinion that the ordinance was not arbitrary, unreasonable and capricious nor did it violate state law. But nothing at all was said about whether the ordinance constituted "spot zoning." The decision was affirmed on the other two grounds, leaving the impression that in this instance "spot zoning" is acceptable, but the court again failed to set forth adequate guidelines.

Judging by the decision in *Blacklidge*, the court still is extremely reluctant to decide cases on the issue of "spot zoning." In the only instance in which the court has condemned the practice, the wording is somewhat ambiguous. The condemnation, if such it is, is only backhanded at best. *City of Jackson v. Wilson*[33] contains this language:

> There are many factors which the City Council should consider before they honor a request to spot zone, ... The City Council should look askance at a request for rezoning where it will inure to the benefit of one property owner and allow him to get a tremendous price for his property, when at the same time it will be very detrimental to other property owners, and will greatly decrease the value of many homes in the neighborhood.[34]

The use of the term "spot zoning" in this instance could be confusing. "Spot zoning is a descriptive rather than a legal term and as such is not necessarily invalid."[35] From the language used, it would appear that municipalities may indeed "spot zone," but that their actions in this regard will be closely scrutinized by the courts. The court has told how the municipalities should amend their zoning ordinances,[36] but has failed to tell how to avoid the pitfalls of illegal "spot zoning." Perhaps the court feels that the problem is not severe enough to warrant any serious discussion. Perhaps they have been right, so far.

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[29] 243 Miss. at 251-52, 137 So. 2d at 538.

[30] *Id.* at 252, 137 So. 2d at 538.

[31] 223 So. 2d 530 (Miss. 1969).

[32] *Id.* at 532.

[33] 195 So. 2d 470 (Miss. 1966).

[34] *Id.* at 473.

[35] 8 E. McQUILLIN, *supra* note 18, at 231.

[36] Martinson v. City of Jackson, 215 So. 2d 414, 418 (Miss. 1968).

Conclusion

The Mississippi Code says that zoning is "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community, ..."[37] Our court has inferred that "spot zoning" may indeed serve these noble ends. But, the court has warned that "spot zoning" should never be considered when it might "inure to the benefit of one property owner . . . when at the same time it . . . will greatly decrease the value of many homes in the neighborhood,"[38] or when it is not in accordance with a comprehensive zoning plan.[39] But does this tell us enough? Rathkopf, a leading authority frequently quoted by the Mississippi Supreme Court, speaks in terms of reasonableness:

> . . . [W]hen the rezoning is justifiable in terms of general welfare (hence reasonable) the harm imposed or benefit conferred upon the owner of the property involved is incidental . . . . Where the rezoning is not shown to have been in pursuance of any of the purposes of zoning as set forth in the enabling act, then benefit to the owner of the property is left as the sole reason for its enactment.[40]

It is submitted that either "spot zoning" is not considered a danger in this state by our own Supreme Court, or that the court's own reluctance to interfere with municipal affairs has thus far kept it from exercising its powers in this field. The more reasonable view is the latter. Thus far the attempts at "spot zoning" may not have been viewed by the court as serious enough to cause any alarm. But the tremendous volume of cases quoted in the treatises cited in this note indicate that the more urban states have been forced to accept the fact that "spot zoning" must be controlled rigidly by the courts. This control has been far more involved than the *caveats* issued in *Wilson* and *Ridgewood*. It is clear that "spot zoning" may be utilized as a legitimate planning device. Where it has been used as such in Mississippi, our court has not deigned to illuminate the legitimate uses of "spot zoning."[41] It is submitted that some guidelines for proper exploitation of this device should be set down by the supreme court. Any questions in our body of law must be answered and the doubts must be laid to rest. Judge Yokley's opinion[42] to the contrary notwithstanding, "spot zoning" can be useful as a planning device under the proper controls.

William M. Bost, Jr.

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[37] Miss. Code Ann. § 3590 (Supp. 1968).

[38] City of Jackson v. Wilson, 195 So. 2d 470, 473 (Miss. 1966).

[39] Ridgewood Land Co. v. Simmons, 243 Miss. 236, 252, 137 So. 2d 532, 538 (1962).

[40] 1 A. Rathkopf, *supra* note 14, at 26-5.

[41] *See* Blacklidge v. City of Gulfport, 223 So. 2d 530 (Miss. 1969).

[42] *See* E. Yokley, *supra* note 1, at § 82.

LABOR LAW—STATE COURT INJUNCTIONS FOR BREACH OF COLLECTIVE BARGAINING AGREEMENTS

The recent Mississippi Supreme Court decision, *Masonite Corporation v. Local 5-443, International Woodworkers*,[1] spotlights the complexities of the relationship of § 301 (a) of the Labor-Management Relations Act (Taft-Hartley Act)[2] to § 4 of the Norris-LaGuardia Act.[3]

This note will appraise *Masonite* and use it as a starting point to investigate, and to suggest solutions to, the following problems which it raises directly or points to indirectly: (1) The proper remedy in a suit for a breach of a no-strike clause in a collective bargaining agreement considering the concurrent jurisdiction created in state and federal courts by § 301 (a) of Taft-Hartley in such suits. (2) The conflicting goals established by Supreme Court decisions in cases concerning the use of injunctions in labor disputes and cases setting out national labor policy.

Masonite Corporation and Local 5-443, International Woodworkers entered into a collective bargaining agreement which contained, among other things, an arbitration clause and a no-strike clause.[4] Alleging that Masonite had violated the contract by requiring employees to cross departmental lines, that it had been neglectful in processing the grievances of the employees and that it was thus guilty of unfair labor practices which rendered the contract and collective bargaining agreement void, the union called a strike.[5] Masonite sought to enjoin this strike. The case reached the Mississippi Supreme Court on appeal by Masonite from a final decree of the Chancery Court of the Second Judicial District of Jones County dismissing with prejudice Masonite's bill for injunction which would have made permanent a temporary injunction which had

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[1] 215 So. 2d 691 (Miss. 1968), *cert. denied*, 394 U.S. 974 (1969).

[2] 29 U.S.C. § 185 (a) (1964), which provides as follows:

> **Suits for violation of contracts** between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[3] 29 U.S.C. § 104 (1964), which provides in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment . . . .

[4] 215 So. 2d at 692. The collective bargaining agreement

> provided for a five-step program for resolving grievances of employees against Masonite. The final step of this program was arbitration. In addition to Article 26 of the contract which provides for the adjustment procedure and for arbitration, Article 23 of the collective bargaining agreement provides what is commonly referred to as a "no strike" clause. Section 1 of Article 23 states: "At no time, during the full term of this agreement, shall the Union or any of its members authorize or engage in any strike, walkout or other type of work stoppage. At no time, during such term, shall the employer lock out any of its employees."

[5] *Id.* at 693.

been issued pursuant to a fiat by Justice Robertson of the Mississippi Supreme Court.

The Mississippi Supreme Court, relying on *Charles Dowd Box Company v. Courtney*,[6] *Smith v. Evening News Association*,[7] and *NLRB v. George E. Light Boat Storage, Incorporated*,[8] held that state courts retain concurrent jurisdiction in cases where unfair labor practices are alleged to have been committed in violation of a collective bargaining agreement.[9] The court concluded that neither § 301 (a) of the Taft-Hartley Act nor the National Labor Relations Act preempted the field in favor of federal courts or the National Labor Relations Board,[10] noting[11] that the Supreme Court in *Evening News*[12] refused to apply the preemption doctrine implied in *San Diego Building Trades Council v. Garmon*[13] and *Guss v. Utah Labor Relations Board*.[14]

Having determined that state courts have jurisdiction to hear cases where unfair labor practices are alleged to have been committed in violation of a collective bargaining agreement, the court then faced the more difficult question of "whether the anti-injunctive provision of the Norris-LaGuardia Act is applicable to state courts"[15] as well as to federal courts.

The court held that it could enjoin the breach of the no-strike clause by the union.[16] It relied, first, on the language of § 4 of the Norris-LaGuardia Act.[17] Further, it reasoned:

> It is significant that the Norris-LaGuardia Act refers only to "court of the United States." Section 13 (d) of that act defines the term "court of the United States" as "any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia." It is indisputable from the precise language of the Act itself that the congressional intent was to restrict the operation of the Norris-LaGuardia Act solely to the federal courts, including courts of the District of Columbia.[18]

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[6] 368 U.S. 502 (1962).

[7] 371 U.S. 195 (1962).

[8] 373 F.2d 762 (5th Cir. 1967).

[9] 215 So. 2d at 694-95.

[10] *Id.* at 695.

[11] *Id.*

[12] 371 U.S. at 197.

[13] 359 U.S. 236 (1959). This doctrine in brief maintains that the National Labor Relations Act preempted State court jurisdiction where the conduct of the union constituted an unfair labor practice under § 8 of the N.L.R.A. or where the activity of which the State purports to regulate is protected by § 7 of the Act. *Id.* at 244.

[14] 353 U.S. 1 (1957). For a broader discussion of the preemption doctrine see Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542 (1959).

[15] 215 So. 2d at 696.

[16] *Id.* at 700.

[17] 29 U.S.C. § 104 (1964). Statute quoted in relevant part in note 3 *supra*.

[18] 215 So. 2d at 696.

If the Norris-LaGuardia Act stood alone there would be no question as to its non-applicability to state courts. However, it does not stand alone. Section 301 (a) of the Taft-Hartley Act has, by interpretation of the Supreme Court, a significant relevance when considering § 4 of the Norris-LaGuardia Act.

On its face § 301 (a) could be thought merely to expand the jurisdiction of federal district courts to controversies that involve labor organizations in industries affecting commerce without regard to diversity of citizenship or the amount in controversy.[19]

The Supreme Court in *Textile Workers Union v. Lincoln Mills*[20] emphatically put to rest this view that § 301 (a) is merely jurisdictional. Not only did it hold that § 301 (a) was substantive as well as jurisdictional,[21] but it also clarified what substantive law was to be applied.

> We conclude that the substantive law to apply in suits under Section 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statuatory mandates. Some will lack express statuatory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.[22] (citations omitted).

Finally, *Lincoln Mills* made it clear that the policy which Congress adopted by enacting § 301 was the policy that industrial peace can best be obtained by the enforcement of arbitration agreements and "that federal courts should enforce these agreements on behalf of or against labor organizations. . . ."[23]

It is clear, then, that *Lincoln Mills* and its progeny, the *Steelworkers Trilogy*,[24] have established without a doubt the primacy of federal law under § 301 (a) and the congressional and national policy fostering the arbitration process. Furthermore, the Supreme Court has stressed the

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[19] *Accord, e.g.*, United Steelworkers v. Galland-Henning Mfg. Co., 241 F.2d 323, 325 (7th Cir. 1957); Mercury Oil Ref. Co. v. Oil Workers Union, 187 F.2d 980, 983 (10th Cir. 1951).

[20] 353 U.S. 448 (1957).

[21] *Id.* at 455.

[22] *Id.* at 456-57.

[23] *Id.* at 455.

[24] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

need for uniformity in applying federal law under § 301 (a) in *Teamsters Local 174 v. Lucas Flour Company*.[25] What effect does this have on § 4 of the Norris-LaGuardia Act respecting state courts? As federal law, which is supreme in this area, does it apply to state courts?

In *Masonite* the court concluded it was still free to grant injunctive relief because § 4 of Norris-LaGuardia has not been made applicable to state courts by § 301 (a) of Taft-Hartley.[26] It rejected the argument of the union that since federal courts are without power to enjoin strikes, then state courts are likewise prohibited due to the need for uniformity as expressed in *Lucas Flour*.[27] It argued in conclusion:

> Because of the legislative history and the purposes of the Norris-LaGuardia Act and of Section 301 of the Labor Management Relations Act, the repeated refusal of the Supreme Court for over a decade to specifically rule on the question and negate congressional intent, and to also overrule the overwhelming weight of authority in the various states which allow injunctive relief in labor disputes growing out of violations of collective bargaining agreements, we cannot agree that the broad general request for uniformity under Section 301, as set out in [*Lucas Flour*] and [*Lincoln Mills*], transcends and takes from the state courts the equitable remedy of the injunction.[28] (citations omitted).

Numerous state courts are in accord with the decision in *Masonite*.[29]

In two leading federal decisions, however, the Third Circuit Court and the Sixth Circuit Court are in conflict over this point. The third circuit in *American Dredging Company v. Local 25, Marine Division Operating Engineers*[30] maintained that the anti-injunction provisions of the Norris-LaGuardia Act had no application to state court actions.[31] The sixth circuit in *Avco Corporations v. Aero Lodge 735, Machinists*[32] argued that state courts have been preempted of their authority to grant injunctive relief in labor disputes.[33]

There was an additional conflict in the two cases as well. *Avco* allowed removal from a state court to a federal district court by a union of an employer's suit for an injunction against a strike claimed to be in

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[25] 369 U.S. 95 (1962). The Court said:

> Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.
>
> More important, the subject matter of § 301 (a) "is peculiarly one that calls for uniform law." *Id.* at 103.

[26] 215 So. 2d at 697.

[27] *Id.* at 697-98.

[28] *Id.* at 697.

[29] *Id.* at 696. *See* Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia*, 79 HARV. L. REV. 757 (1966).

[30] 338 F.2d 837 (3d Cir. 1964).

[31] *Id.* at 852.

[32] 376 F.2d 337 (6th Cir. 1967).

[33] *Id.* at 342.

breach of a no-strike clause in a collective bargaining agreement.[34] *American Dredging* denied removal in similar circumstances on the basis that the federal court did not have subject matter jurisdiction within the original jurisdiction provision of the removal statute.[35]

The Supreme Court granted certiorari in the *Avco* case.[36] On the basis that a federal district court has original jurisdiction of a § 301 action under 28 U.S.C. § 1337,[37] and that such action is thus removable from a state court to a federal district court under 28 U.S.C. § 1441,[38] it affirmed the sixth circuit.[39]

The Court, however, avoided the question of the applicability of § 4 of the Norris-LaGuardia Act to state courts:

> We find it unnecessary to rule on the holding of the Court of Appeals below that "the remedies available in State Courts are limited to the remedies available under Federal law . . . ." That conclusion would suggest that state courts are precluded by Section 4 of the Norris-LaGuardia Act from issuing injunctions in labor disputes, even though the defendant does not exercise his right—which we confirm today—to remove the case to the District Court under 28 U.S.C. § 1441 (b), and the state court therefore retains jurisdiction over the action. We have no occasion to resolve that matter here, since respondents did elect to have the case removed.[40] (citation omitted).

The court in *Masonite* places emphasis on this language of the Supreme Court in arriving at its decision. "The only reasonable inference to be drawn therefrom is that the Supreme Court would not by its decision interpret an act of Congress in order to accomplish that which Congress itself refused to do."[41] Although this interpretation of the Court's language is perhaps somewhat of an overstatement, the fact remains that the sixth circuit alone, in *Avco,* has gone as far as to

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[34] *Id.* at 339.

[35] 338 F.2d at 842.

[36] Avco Corp. v. Aero Lodge 735, Machinists, 389 U.S. 819 (1967).

[37] 28 U.S.C. § 1337 (1964) provides in relevant part: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."

[38] 28 U.S.C. § 1441 (1964) provides in relevant part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties . . . .

[39] Avco Corp. v. Aero Lodge 735, Machinists, 390 U.S. 557 (1968).

[40] 390 U.S. at 560 n.2.

[41] 215 So. 2d at 700.

maintain that § 301, by incorporating § 4 of the Norris-LaGuardia Act, precludes state courts from issuing injunctions in labor disputes. The *Masonite* decision is sound and well documented,[42] and it accentuates the larger problem.

Considering *Masonite* together with the Supreme Court's ruling in *Avco*, we have the situation where an employer can file a bill for an injunction in a state court with the possibility of having it granted, but can be stymied by the union which need only exercise its right to remove to the federal district court. The federal court is precluded from granting the injunctive relief available to the state court since the Supreme Court in *Sinclair Refining Company v. Atkinson*[43] held that the breach of a no-strike clause of a collective bargaining agreement is a labor dispute within the meaning of the Norris-LaGuardia Act,[44] and that the provisions of the Act prohibiting federal courts from issuing injunctions in such cases were not impliedly repealed by § 301 of the Taft-Hartley Act.[45] The situation is even more complicated if we consider at the same time the policy expression in *Lucas Flour* advocating uniformity in the settlement of labor disputes.

To clarify this situation, take the instant case as example. As it is, the union was enjoined from picketing. By removal to the federal district court (*Avco* has said this is a right), the injunction most likely would be dissolved as it was in *Avco*. The result is a classical example of the forum determining the available remedies if the right to removal is not utilized. If it is utilized, which presumptively it henceforth will be by any union which finds itself in this situation, then a legitimate state remedy is rendered a mockery, existing in theory but never in fact actualized. In addition, concurrent jurisdiction will, in practice, effectively be reduced, contrary to the purpose of § 301 (a) as maintained by the Supreme Court in the *Dowd Box* case:

> The legislative history makes clear that the basic purpose of Section 301 (a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations.[46]

The problems thus created and their resulting consequences may possibly, but not probably, be avoided by an escape which the Supreme Court left itself in *Avco*. To this point we have assumed that upon removal from a state court, where an injunction has been granted, to the federal district court, that court will dissolve the injunction as was done in *Avco*. Considering the *Sinclair* decision, a strong argument can be made in favor of this action by the district court in *Avco*. If a federal court is prohibited from directly granting an injunction as is provided by *Sinclair*, it follows, arguably, that upon taking a case on removal it

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[42] *See* Wellington, *supra* note 14.

[43] 370 U.S. 195 (1962).

[44] *Id.* at 199.

[45] *Id.* at 203.

[46] 368 U.S. at 508.

is fitting for it to dissolve that same injunction. There is no doubt as to its power to do so.[47]

However, there is a question as to whether it *must* do so. In *Avco*, the Supreme Court refused to settle this question:

> Another question raised here is whether the District Court, to which the action had been removed, should have dissolved the injunction issued by the Tennessee State Court. There is, of course, no question of the power of the District Court to dissolve the injunction. . . . Whether it did so because it felt that action was required by *Sinclair* . . . , or because of its equity powers or both is not clear. . . . We reserve decision on those questions.[48] (citations omitted).

Thus, the Court, in effect, delayed the decision as to whether a district court *must* dissolve an injunction granted by a state court when a case is removed and a motion to dissolve the injunction is made, while holding, at the same time, that it *may* do so. If and when a district court refuses to dissolve such an injunction, we anticipate the Court facing this question directly. At that time if the Court rules it is mandatory for federal district courts to dissolve injunctions in labor disputes granted by state courts once the case is removed to the federal district courts, all the problems this note raises are pertinent. If it rules such action is permissible, but not mandatory, then a whole new set of problems arises concerning the uniformity of administration of federal labor laws, for then some federal courts might dissolve injunctions as in *Avco*, and, possibly, some might refuse to do so. This theoretical possibility, left open by the Supreme Court in its decision in *Avco*, seems remote.

Proceeding on the assumption that federal courts will act as the one did in *Avco*, we have arrived at an impasse. The Supreme Court in *Avco* allowed an "end-run"[49] around the equity jurisdiction exercised by state courts. Assuming unions will in fact remove, as a matter of course, from state courts to federal district courts, then the injunction will, as a matter of fact, disappear as a remedy for the breach of a collective bargaining agreement. Such events will make for uniformity as called for by *Lucas Flour*. However, the value of arbitration, the keystone principle of our national labor policy, as set forth in *Lincoln Mills* and the cases following it,[50] will be vastly weakened. If "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike,"[51] and if "[c]ongress was also interested in promoting collective bargaining that ended with agreements not to strike,"[52] then the loss of

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[47] 28 U.S.C. § 1450 (1964). This statute provides in relevant part:

> Whenever any action is removed from a state court to a district court of the United States . . . .
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> . . . .
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> All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

[48] 390 U.S. at 561 n.4.

[49] Lesnick, *supra* note 29, at 757.

[50] Cases cited *supra* note 24.

[51] 353 U.S. at 455.

[52] *Id.* at 453.

the injunction to prevent strikes in breach of a collective bargaining agreement is directly contrary to the congressional policy on arbitration. If the employer loses its *quid pro quo*, no strikes, is it likely it will long agree to arbitrate? If it is left only with a far slower and less effective damage suit remedy[53] while faced itself with decrees of specific performance of the arbitration provisions of a collective bargaining contract such as in *Lincoln Mills*,[54] can it be expected to believe it truly has a *quid pro quo*? The questions seem to compel a negative answer.

At present, so long as the *Sinclair* decision stands, there is no way to satisfy both salutory aims of Supreme Court decisions—to facilitate arbitration and to establish consistent federal law governing the enforcement of collective bargaining agreements. An injunction, such as in *Masonite*, perhaps facilitates arbitration in the future, but is a detriment to consistency since a federal district court would not grant such an injunction. If all such future cases are removed to a federal district court, as they in all probability will be, then consistency in the form of no injunctions is served, but, for the reasons already suggested, peaceful settlement of labor disputes by arbitration will be harmed.

In summary, it appears the best solution would be for federal courts to have the jurisdiction to enjoin breaches of no-strike clauses in collective bargaining contracts. In this way, consistency and arbitration would both be served as well as maintaining state courts as a concurrent forum. Removal from state to federal courts would obviously still be available, but, if federal courts could enjoin, then one great reason for removal would be negated.

The dissent in *Sinclair* argued for such a position, based on the ability to accommodate § 301 (a) of Taft-Hartley with § 4 of Norris-LaGuardia[55] and on the harm the majority opinion would do to the

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[53] Wellington, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547 (1963).

> It is plainly contrary to the obligation for a union to strike over an arbitrable grievance. An employer may recover damages if a union does so strike. A damage remedy alone, however, may be a less effective way of implementing the policy contained in *Lincoln Mills* and its progeny than the strike injunction. A suit for damages can drag on for a long time, well beyond the time it takes for an arbitrator to enter his award, and for a court to enforce it. Continuing litigation tends to undermine the salutory effect of the arbitration process, for it keeps the parties in a posture of conflict rather than in a state of repose. The injunction, on the other hand, is quick and clean and its radiations tend to be coextensive with the arbitration process. *Id.* at 1557-58.

[54] 353 U.S. at 458-59.

[55] 370 U.S. at 217. The Court's language follows:

> The Court has long acted upon the premise that the Norris-LaGuardia Act does not stand in isolation. It is one of several statutes which, taken together, shape the national labor policy. Accordingly, the Court has recognized that Norris-LaGuardia does not invariably bar injunctive relief when necessary to achieve an important objective of some other statute in the pattern of labor laws. See Brotherhood of R. Trainmen v. Chicago River & I.R. Co., 353 U.S. 30; Graham v. Brotherhood of Locomotive Firemen, & Enginemen, 338 U.S. 232; Virginian R. Co. v. System Federation, R.E.D., 300 U.S. 515, 562-563. In *Chicago River* we insisted that there "must be an accommodation of [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." (footnotes omitted).

arbitration process,[56] uniform federal labor law,[57] and contract remedies available in state courts before the enactment of § 301.[58] As long as this dissent remains the minority view of the Supreme Court, the goals of our national labor policy will be beyond reach.

The *Masonite* decision makes the present problems and inconsistences become extremely clear in Mississippi. *Avco* is too recent to compile significant statistics, but, undoubtedly, unions will remove injunctive suits to federal courts where, if already granted, the injunctions will in all probability be dissolved. As this becomes the rule, it is naive to believe employers will continue to enter into contracts with binding arbitration provisions, with the result that the most proved technique yet for maintaining industrial peace and productivity will be threatened.

It would seem that the Supreme Court must soon face the question presented in *Sinclair* once again, and face it in the light of *Avco*, as well as of its other previous related decisions discussed herein. Hopefully, a solution along the lines of the dissent in *Sinclair* will be the outcome.

George Q. Evans

Admiralty—The Changing Law of Fixed Offshore Installations

The law applicable to fixed offshore drilling platforms beyond a state's territorial waters is of particular interest to the admiralty practitioners in Mississippi and in other states along whose coast lines extensive offshore drilling is now taking place. Approximately 1,000 wells—exploratory, development, and service—are being drilled annually off the Gulf Coast.[1] As early as 1963 residents of Mississippi were involved in this offshore quest.[2] Moreover, Mississippi, in 1966, had 198 enterprises and over 1,800 men engaged solely in the exploration and drilling phases of the petroleum industry.[3] Finally, a recent impetus was given to the activity off the Mississippi Coast with the freeing of 600,000 acres of offshore land for oil and gas exploration.[4]

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[56] *Id.* at 227.

[57] *Id.* at 226.

[58] *Id.* at 227.

[1] Offshore drilling has steadily increased during the past decade. In 1961, 503 wells were drilled; 1962, 731; 1963, 720; 1964, 883; 1965, 975; and finally in 1966, 1058 with over eleven million feet of pipe. American Petroleum Institute, Petroleum Facts and Figures 37 (1967).

[2] 2 U.S. Dep't of Commerce, Census of Mineral Industries 29 (1963).

[3] American Petroleum Institute, *supra* note 1, at 291.

[4] Development of Mississippi's offshore oil industry had previously been hindered by a provision of the Mississippi Constitution. The Constitution prohibited the construction of any obstruction in navigable water. Miss Const. art. 4, § 81 (1890). This section was amended to exclude "facilities incident to the exploration, production or transportation of oil, gas, or other minerals. . . ." Miss. Const. art. 4, § 81. With this prohibition against obstructive facilities removed and with the alteration of the State Mineral Lease Commission's policy against leasing in small blocks, parcels of 6,000 acres can now be leased. Miss. Code Ann. § 5948 (Supp. 1968). The previous policy of the Commission was to lease 990,000 acres in a single block. The Commercial Appeal, Sept. 26, 1968, at 15, col. 1-2.

Perhaps the single most important statute applicable to the outer continental shelf is the Outer Continental Shelf Lands Act.[5] Although under the Outer Continental Shelf Lands Act the applicable substantive law for an injury or death received in connection with a fixed offshore platform had previously been determined to be maritime law, a recent United States Supreme Court decision, *Rodrique v. Aetna Casualty Co.*,[6] has seemingly changed the law. The decision is somewhat surprising not only because the Court failed to consider an extension of the Jones Act[7] to employees upon fixed drilling platforms, but also because the Court contended that under the Outer Continental Shelf Lands Act the intention of Congress was that the exclusive remedy of the non-seaman who met his death on an artificial island or permanent structure on the outer continental shelf would not be through the Death on the High Seas Act.[8]

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[5] (a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter. 43 U.S.C. § 1332 (1964).
(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; restriction on State taxation and jurisdiction.
(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* that mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.
(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of the effective date of this subchapter are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and court of the United States. State taxation laws shall not apply to the outer Continental Shelf.
(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. 43 U.S.C. § 1333 (1964).

[6] 395 U.S. 352 (1969).

[7] 46 U.S.C. § 688 (1964). The Jones Act provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with a right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply . . . ."

[8] 46 U.S.C. § 761 *et seq.* (1964) provides that "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty . . . ."

Perhaps an examination of the *Rodrique* case, a close look at prior decisions, and a comparison of those holdings will shed some light on this somewhat confused area of the law.

Rodrique involved the appeal of two men. Each was working on a fixed drilling platform located on the outer continental shelf of Louisiana. One of them, Dore, while some 50 miles from shore, was operating a crane to unload a barge. The crane collapsed onto the platform and Dore was killed. The other, Rodrique, was testing drilling pipe high upon a derrick from which he fell to his death to the floor of the structure. The families of each man brought suit in federal court under the Death on the High Seas Act and under the Louisiana law[9] made applicable by the Outer Continental Shelf Lands Act.

In both cases the district court dismissed all but the Death on the High Seas Act,[10] holding it to be the exclusive remedy and stating that state law would be applicable only if federal law was not applicable. The Court of Appeals for the Fifth Circuit affirmed.[11]

The nine justices of the United States Supreme Court in reversing the lower federal courts unanimously spoke of the applicability of federal or state law to these fixed structures. The Court's pronouncement appears to desire the removal from these fixed installations of any aspect by which the admiralty jurisdiction could be invoked. Mr. Justice White, speaking for the Court, pointedly declared:

> In light of the principles of traditional admiralty law, the Seas Act, and the Lands Act, we hold the petitioner's remedy is under the Lands Act and Louisiana Law.[12]

This simple statement seemingly overrules much of the previous case holdings in the area of fixed drilling platforms.

Mr. Justice White further noted that under the Outer Continental Shelf Lands Act the laws of the United States are extended to subsoil, seabed, artificial islands and fixed structures on the outer continental shelf.[13] The Lands Act makes it clear that federal law is to be applied to these fixed islands as if they were federal enclaves in the upland states.[14] The Lands Act made applicable the Constitution, federal statutes, the regulations of the Secretary of Interior, and the laws of the adjacent states.[15] State law could be applied only to fill federal voids, i.e., those areas where some federal law or statute was not available. In those voids state law should be applied as federal law.[16]

The previous paragraph corresponds with the traditional interpretation given the Outer Continental Shelf Lands Act. *Rodrique*

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[9] LA. CIV. CODE ANN. art. 2315 (West 1952).

[10] Dore v. Link Belt Co., Civil No. 11,662 (W.D. La. judgment entered Oct. 26, 1966); Rodrique v. Aetna Cas. & Sur. Co., 266 F. Supp. 1 (E.D. La. 1967).

[11] Dore v. Link Belt Co., 391 F.2d 671 (5th Cir. 1968); Rodrique v. Aetna Cas. & Sur. Co., 395 F.2d 216 (5th Cir. 1968).

[12] Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 355 (1969).

[13] *Id.* at 357.

[14] *Id.*

[15] *Id.*

[16] *Id.*

differs markedly, however, in holding that the Death on the High Seas Act was not one of the federal statutes which would apply, thus creating a void, which would require adjacent state law to be utilized. The Supreme Court declared that the Death on the High Seas Act is designed to protect deaths on the high seas and not on fixed platforms, i.e., artificial islands.[17]

The lower federal courts had contended that:

> Under the Death on the High Seas Act, when wrongful death occurs beyond a marine league from the shore or any state, a remedy is provided in Admiralty in the United States courts. Under the Outer Continental Shelf Lands Act, the laws of the United States are extended to the subsoil, seabed, artificial islands and fixed structures on the outer Continental Shelf.[18]

The lower federal courts' holdings seem to be in harmony with the general law in the area prior to *Rodrique*. The majority of cases have held that when death occurs outside of a marine league, the exclusive action is under the Death on the High Seas Act.[19] Nor does it seem particularly important that death occurred upon a fixed platform rather than a ship or airplane. In *Williams v. Moran, Proctor, Mueser & Rutledge*, a district court held that the reasoning which brought air accidents into the purview of the Death on the High Seas Act acted with equal force to include Texas towers.[20]

The fifth circuit also noted that in resolving disputes which involve the question of whether federal or state law is applicable to torts occurring on the outer continental shelf, federal law has been uniformly applied.[21]

The fifth circuit had previously faced the question in *Pure Oil Co. v. Snipes*.[22] Here the injury occurred on a fixed drilling platform in the area covered by the Outer Continental Shelf Lands Act. The employee, while dismantling a pipe, fell to the deck below and then through a hole into the ocean. The circuit court declared that:

> In every sense of the word this happened on the high seas. It did not happen in Louisiana.
>
> . . . .
>
> We think that a consideration of both the intrinsic and extrinsic factors requires the conclusion that it was the intention of Congress that (a) the occurance be governed by Federal, not State, law, and (b) that the Federal law thereby promulgated would be the pervasive maritime law of the United States.[23]

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[17] *Id.* at 359.

[18] Dore v. Link Belt Co., *supra* note 11, at 674.

[19] *See* Hiya v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955); Jennings v. Goodyear Aircraft Corp., 227 F. Supp. 246 (Del. 1964); Devlin v. Flying Tiger Lines, Inc., 220 F. Supp. 924 (S.D.N.Y. 1963).

[20] 205 F. Supp. 208, 213 (S.D.N.Y. 1962).

[21] Dore v. Link Belt Co., *supra* note 11, at 674.

[22] 293 F.2d 60 (5th Cir. 1961).

[23] *Id.* at 64.

Moreover, the court noted that whether the injury occurred on a fixed platform or in the water was unimportant, finding that:

> [T]he substance and consummation of the occurrence which gave rise to the cause of action is not decisive. This is because the Outer Continental Shelf Lands Act itself reveals that when it is federal, not adjacent state, law to apply, Congress adopted the maritime standards.[24]

The court, in *Snipes*, found two specific indications within the Outer Continental Shelf Lands Act that implied that Congress had desired the adoption of maritime law and that federal and not state law applied. First, the Congress had committed to a "traditionally maritime agency," the Coast Guard, the duty to promulgate and enforce regulations on the artificial islands.[25] This administrative framework indicated to the circuit court that:

> [A]s the hazards and risks are essentially maritime, it is appropriate that standards of safety be those imposed by the maritime law with policing and enforcement left to the traditional maritime agency. . . . [I]t was a determination that this matter could not adequately be left to the adjacent states . . . .[26]

The second indication that Congress intended to make federal maritime law applicable was the express adoption within the Outer Continental Shelf Lands Act of the Longshoremen's and Harbor Worker's Compensation Act.[27] Judge Brown, speaking for a unanimous court in *Snipes*, noted that:

> Congress knew from long experience the desirability—if not the constitutional necessity—of a substantial uniformity in dealing with matters maritime. It runs counter to the whole purpose of the Act to assume that Congress meant a matter of such importance as safety of life and limb should be left to the shifting policies of adjacent states.[28]

This case was followed in 1967 by *Ocean Drilling and Exp. Co. v. Berry Bros. Oilfield Service*, involving two employees who had sustained injuries while performing repairs on a fixed platform resting on the floor of the Gulf of Mexico about 30 miles off shore.. The fifth circuit held that federal maritime law and not the law of Louisiana or any other state controlled the controversy.[29]

Next came *Loffland Brothers Co. v. Roberts*.[30] Roberts was injured on a fixed offshore drilling platform located on the outer continental

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[24] *Id.* at 65, 66.

[25] *Id.* at 66.

[26] *Id.* at 67.

[27] *Id.*

[28] *Id.* at 69.

[29] 377 F.2d 511, 513 n.4 (5th Cir. 1967).

[30] 386 F.2d 540 (5th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968).

shelf. The injured party fell onto the platform rather than into the sea as had been the case in *Ocean Drilling, supra.* The decision noted that:

> In *Pure Oil Co. v. Snipes* . . . this court carefully reviewed the Outer Continental Shelf Lands Act and concluded that Congress deemed the hazards presented by the offshore drilling platforms to be maritime in nature. We therefore held that under the Act federal maritime law was to apply to torts occurring on the offshore platforms. That decision has been consistently followed by the Court.[31]

The examination of these cases would readily warrant the conclusion that in fact maritime law as opposed to any state law was to be applied to fixed drilling platforms. Indeed, this has been the approach taken by various authorities in the field of admiralty. It has been noted, first, that the Outer Continental Shelf Lands Act can incorporate an adjacent state's law except where inconsistent and, secondly, that the Death on the High Seas Act was applied rather than the Louisiana state death act to a helicopter crash beyond three miles from shore, but above the continental shelf.[32]

In view of the law prior to *Rodrique,* the Court must have been faced with some difficulty in removing the shroud of maritime coverage from the offshore fixed platform. The Court pointed out that the Death on the High Seas Act was to cover deaths on the high seas, not on artificial islands;[33] and, it also noted that since the structures were not aids to navigation, about the only way for admiralty jurisdiction to apply was for the "island" to be struck by a ship, thus allowing the provisions of the Admiralty Extension Act to come into play.[34] The Court declared "It was an island, albeit an artificial one, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers."[35] The Justices were forced to go back to a 1908 case for a holding that fixed platforms are not within the admiralty jurisdiction.[36] Then in language almost directly contradictory to *Pure Oil Co. v. Snipes*[37] the court said that there is no reason to assume that Congress intended to extend those principles to create an admiralty remedy here.[38]

An alternative solution for the Court might have been found in an

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[31] *Id.* at 545.

[32] P. Edelman, *Liability Problems in the Exploration of the Seas,* 5 Tr. Law Q. 43, 53 (1968).

[33] Rodrique v. Aetna Cas. & Sur. Co., *supra* note 12, at 359.

[34] *Id.* at 360. The Admiralty Extension Act provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land. 46 U.S.C. § 740 (1964).

[35] *Id.*

[36] *Id.,* citing Phoenix Constr. Co. v. The Steamer Poughkeepsie, 212 U.S. 558 (1908).

[37] 293 F.2d 60 (5th Cir. 1961).

[38] Rodrique v. Aetna Cas. & Sur. Co., *supra* note 12, at 361.

application of the "extension of land" doctrine.[39] This would have facilitated reaching the decision reached, and it would have obviated the necessity for the examination of the legislative intent behind the Outer Continental Shelf Lands Act engaged in by the Court. In reality, the Court may have had in mind a "vertical" extension of land doctrine, although they never employed this term. The result in either case certainly would have been the same.

Another mild surprise of *Rodrique* lies in the fact that many might have supposed that the Court would extend the Jones Act coverage to these fixed offshore structures. Of course, the petitioners did not seek recovery under the Jones Act, but in view of the enlarged scope of this highly beneficial statute, the Court might, by its own initiative, have extended seaman's coverage to Dore and Rodrique. A series of cases has greatly enlarged the definition of what a seaman actually is.[40] This series culminated in 1959 with the famous decision of *Offshore Co. v. Robison*,[41] wherein Judge Wilson noted the expansive ambit of coverage of the Jones Act.

> Expansion of the terms "seaman" and "vessel" are consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes. Within broad limits of what is reasonable, Congress has seen fit to allow juries to decide who are seamen under the Jones Act. There is nothing in the Act to indicate that Congress intended the law to apply only to conventional members of a ship's company. The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore . . . .[42]

The status of Dore and Rodrique might have qualified them as "members of the crew" under the *Robison* test:

> [I]f there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.[43]

The problem, however, is whether the fixed structures upon which

[39] *See* Wiper v. Great Lakes Eng'r Works, 340 F.2d 727 (6th Cir. 1965), *cert. denied*, 382 U.S. 812 (1965); Hasting v. Mann, 340 F.2d 910 (4th Cir. 1965).

[40] Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1958); Senko v. LaCrosse Dredging Corp., 352 U.S. 370, *rehearing denied*, 353 U.S. 931 (1957); Gianfala v. Texas Co., 350 U.S. 879 (1955).

[41] 266 F.2d 769 (5th Cir. 1959).

[42] *Id.* at 780.

[43] *Id.* at 779.

the decedents were employed could be termed "vessels." Unfortunately for Dore's and Rodrique's beneficiaries the case law has been almost uniformly away from the extension of the Jones Act to workers on fixed platforms.[44] Indeed, a somewhat incongruous situation exists upon this point. If Dore and Rodrique, in their same employment capacity, had been injured upon a submersible drilling barge or a mobile platform as opposed to a fixed platform, they might well have benefited from Jones Act protection, or at least their status as seamen would have been a question of fact.[45]

Adams v. Kelly Drilling Co. said that a member of a drilling crew of a submersible drilling barge which rested on the floor of the continental shelf could, upon the proper jury determination, be covered by the Jones Act.[46] Surely the dangers encountered upon the fixed drilling platform would not be too unlike the dangers encountered upon the submersible drilling rig which rests upon the bottom. In reality it would be hard to argue that any oil drilling personnel is doing the traditional work of a seaman, but rather it would seem coverage has been extended because of the hazardous nature of the offshore operations.

Finally, if the Court had had in mind to extend the coverage of the Jones Act, it would not have been without some precedent. In the case of *In Re United States Air Force Texas Tower No. 4*,[47] the District Court of the Southern District of New York contended not only that *Grimes v. Raymond Concrete Pile Co.* had held a fixed platform to be a vessel under the Jones Act,[48] but also noted that the Court had always construed the Act liberally.[49] In spite of this apparent inequitable situation, however, the Court refused to directly consider an application of the Jones Act to the case at hand.

The possible ramifications of the *Rodrique* case are noteworthy. If the structure is termed an island, the employees upon it could never avail themselves of the Jones Act and the traditional remedies of seamen as do their counterparts upon submersible drilling rigs. Moreover, in addition to the Death on the High Seas Act—which the Court determined would not apply—the Longshoremen's and Harbor Workers' Compensation Act incorporated by the Outer Continental Shelf Lands Act could not apply, since the Longshoremen's and Harbor Workers' Compensation Act is designed to give relief for injury and death occur-

[44] *See e.g.*, Sirmons v. Baxter Drilling, Inc., 239 F. Supp. 348 (W.D. La. 1965); Ross v. Delta Drilling Co., 213 F. Supp. 270 (E.D. La. 1962).

[45] *See* Ledet v. United States Oil of La., Inc., 237 F. Supp. 183 (E.D. La. 1964); Guilbeau v. Falcon Seaboard Drilling Co., 215 F. Supp. 909 (E.D. La. 1963). For a highly useful and informative discussion of the legal consequences which flow from the assorted drilling rigs, *see generally* Comment, *When is an Offshore Oilfield Worker a Seaman?*, 27 LA. L. REV. 757 (1967).

[46] 273 F.2d 887 (5th Cir. 1960), *cert. denied*, 364 U.S. 845 (1960).

[47] 203 F. Supp. 215 (S.D.N.Y. 1962).

[48] *Id.* at 222.

[49] *Id.*

ring over navigable waters.[50] In calling the fixed drilling rig an island, the Court envisions an extension of the land of the state.

Why, then, has the Court reversed the law? The answer in part may be found in the case itself.

> And if the Congress had made the 1920 Seas Act applicable, ousting inconsistent state law, the artificial island worker would be entitled to far less comprehensive remedies in many cases than he is now.[51]

It would seem that if a desire to increase the amount of compensation and damages payable to the beneficiaries had been the only underlying policy reason, the Court might well have accomplished this by employing the federal maritime law and its remedies. Not only would the Death on the High Seas Act have provided protection, but the Jones Act—or in the alternative the Longshoremen's and Harbor Workers' Compensation Act—would have adequately and comprehensively protected the worker upon a fixed installation. The Court, however, chose not to draw from any of these maritime remedies. Indeed, *Rodrique* may well be a harbinger of Supreme Court decisions to come. One should remember that only the circuits have so boldly extended the coverage of the Jones Act. *Rodrique* may have been the first step in placing torts which occur in the development of the continental shelf into the state courts, where in fact the greatest interest in this area may be.

A close examination of the case uncovers some rather interesting points. The Court, while reviewing the legislative history of the Outer Continental Shelf Lands Act, pointed out that the Congressional committee was "acutely aware of the inaptness of admiralty law."[52] In addition the Court, by way of a footnote, cited the testimony of an admiralty attorney before the committee. The testimony indicated that "[m]aritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and the whole tenor is ill adapted for that purpose."[53]

The answer to why the Court ruled as it did may to a large extent lie here. The Court, perhaps after taking an extremely forward look, may have felt that although the cases had started in that direction, maritime law was not adequate to cope with the new activities upon the continental shelf.

It is interesting to speculate on what the next several decades will bring. The wealth resources of the ocean, and particularly of the con-

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[50] A recent decision may have changed the law so as to allow recovery by longshoremen when not "upon the navigable waters" and thus within the coverage of the Longshoremen's and Harbor Worker's Compensation Act as had previously been the law. Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968), *cert. granted*, 393 U.S. 976 (1968), allowed employees on high piers, several hundred feet from shore, to collect. The circuit court held the employees were located above navigable water, and thus the employees were injured upon navigable water.

[51] Rodrique v. Aetna Cas. & Sur. Co., *supra* note 12, at 361.

[52] *Id.* at 364.

[53] *Id.* at 365 n.12.

tinental shelf, are staggering to the imagination. Vast resources and potentials exist in minerals, chemicals, food, land, transportation, power and energy, and communication. As an example of the inappropriateness of maritime law, one needs but to examine one of the above potential resources. It has been submitted that:

> If the population explosion continues unabated, one may expect man to turn to the sea for living space. Two methods seem scientifically feasible at the present time: "platform cities" and reclamation. The construction of "communities" on platforms on the continental shelf, in the manner of present construction by the United States of scientific and industrial platforms on the high seas, seems within the closest reach of present technology.[54]

The Court in looking into the future may well have wondered what law would best apply to these "platform cities," or to mining on the seabed, or to farming the ocean. The Court might well have felt that in all of these situations the adjacent state would have the greatest interest, and hence its law would apply. State law might better be applied to these traditionally land industries and activities without a shroud of maritime law and traditional admiralty principles.

C. Michael Malski

Wills—Will Substitutes in Mississippi

Introduction

By the execution of a will a property owner may reserve, during his lifetime, the advantages of secrecy of his plan of disposition, complete use of his property, including the right to dispose of it at any time, and the further privilege of changing the provisions of the will or revoking the will and executing a different will. Some persons, however, avoid the execution of a will for the reason of some superstitious prejudice against wills. Frequently, no amount of sound advice will suffice to alter this attitude.[1] Others simply procrastinate until they die.

The expenses of probate and administration and the delays that occur before beneficiaries are allowed to take possession of property are common complaints regarding both testate and intestate estates.[2] For these reasons, as well as the reason that certain advantages in taxation are often found when the property of a decedent has been transferred by some other means than intestate succession or through the probate of a will, devices known as will substitutes are often employed.

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[54] Maraist, *The American Tidelands: A Survey of Developments in the Allocation of the Natural Resources of the Continental Shelf Between the Federal Government and the States*, 1968 (unpublished article in possession of Prof. F. Maraist, University of Mississippi Law School).

[1] T. Atkinson, Handbook of the Law of Wills 159-60 (2d ed. 1953) [hereinafter cited as Atkinson].

[2] *Id.* at 160.

Several types of will substitutes will be discussed that have been found acceptable in Mississippi. It is possible that other will substitutes are in common use in Mississippi which, never having been contested and reported upon, will *not* be found in this note. Further, it will not be attempted to show here in what situations will substitutes would or should not be employed. The purpose is to acquaint the reader with some commonly accepted will substitutes in Mississippi and some of the fact situations surrounding their utilization.

I. Deeds

The deed may be used as a will substitute in two ways. One such use is in creating a joint tenancy with a right of survivorship. The other use is in a conveyance of an interest to another party, and in some cases reserving an interest such as a life estate. The most important point to be remembered in this second use of the deed is that the instrument *must convey some vested interest as of the time of its delivery.*

An instrument that contained the words, "[s]aid conveyance to take effect and be in force from and after the date of the death of the party of the first part,"[3] was void as a deed and as a will substitute since the instrument failed to take effect at the time of its execution.[4] Similarly, an instrument purporting to be a deed and reserving a life estate to the grantors and providing, "but not until the death of both grantors herein, does the title pass," was testamentary in character and failed as a deed.[5]

In two cases, however, in which it was stated that title to the land was not to pass, or interest was not to take effect until after the death of the grantor, the instruments were held to be valid deeds.[6] The fact that in both cases the grantees had given, as part consideration, their care of the grantor for some portion of the grantor's life may have influenced the acceptance of these instruments as valid deeds.

It would seem that the situation in which the use of a deed would be most strongly construed to be an effective will substitute is the execution, acknowledgment and delivery of an instrument of conveyance for consideration paid which, by its terms, vests *immediate* title to the land in the grantee subject only to the reservation of a life estate in the grantor.[7]

The court has, however, held more questionable instruments to be valid conveyances. Instruments of conveyance were held valid as deeds and not testamentary in character where the grantors attempted to convey land in fee simple by instruments in the form of warranty deeds, reserving the use of some of the property for life and providing that the grantees pay certain specified sums to grantors until their deaths. The instrument further provided that upon the death of the grantors the property should be the grantees' and that failure by the grantees

[3] Tapley v. McManus, 175 Miss. 849, 853, 168 So. 51, 52 (1936).

[4] *Id.*

[5] Coulter v. Carter, 200 Miss. 135, 26 So. 2d 344 (1946).

[6] Hald v. Pearson, 197 Miss. 410, 20 So. 2d 71 (1944); Rogers v. Rogers, 43 So. 434 (Miss. 1907).

[7] Tanner v. Foreman, 212 Miss. 355, 54 So. 2d 483 (1951).

to make such payments would render the deed void.[8] An instrument was held valid as a deed where the grantor conveyed her interest and title in realty to the grantee with the provision that the grantor should have and hold all of her right and title so long as she shall live but upon her death the grantee shall claim and hold all right and title.[9] In allowing this as an effective instrument of conveyance the court held that the instrument conveyed to the grantee a present interest with the *enjoyment* of the interest to be postponed until the grantor's death.

The court has held that the test of whether an instrument is a valid deed is whether the instrument conveys a vested interest at the time of its writing. An instrument fails as a will substitute if the interest is to take effect only at the grantor's death.[10] Situations may arise in which it is difficult to ascertain whether the instrument is a will or a deed. Again, a will takes effect only at the death of the testator while a deed passes a present interest.[11] The use of the words "I will" did not destroy an instrument of conveyance in which the grantor used these words in designating the grantees of successive life estates. The court held that a present interest passed to all of the grantees even though their right to enjoyment was to take place at some future date.[12] Conversely, the words "This is to convey" in an instrument were not effective, alone, to constitute a conveyance since the instrument was never delivered to the grantee and did not show a sole intention to vest a present interest in the grantee. Since the instrument was in the decedent's handwriting, however, it was admitted to probate as a holographic will.[13]

Delivery and acceptance are, of course, always necessary in making a valid conveyance by a deed as a will substitute. The deed may be delivered to a third party to be delivered to the grantee on the death of the grantor, provided that the delivery to the depository is without any expressed or implied reservation of a right to retake the deed and further provided that the grantee ratifies the appointment of the depository as his agent by his acceptance of the deed.[14] Thus, the execution of a deed to the decedent's niece, reserving a life estate for herself, and the delivery of the deed to the decedent's brother with instructions for him to deliver the deed to her niece upon the decedent's death was held to be a valid conveyance with adequate delivery.[15] And the placing of deeds in a bank for delivery to the grantees after the grantor's death was effective escrow since the grantor placed the deeds out of his control.[16]

It seems then that, although care should be taken in all of the requirements for a proper conveyance by a deed as a will substitute,

[8] Carter v. Dabbs, 196 Miss. 692, 18 So. 2d 747 (1944).

[9] Buchanan v. Buchanan, 236 Miss. 751, 112 So. 2d 224 (1959).

[10] Knight v. Knight, 133 Miss. 74, 97 So. 481 (1923).

[11] Watts v. Watts, 198 Miss. 246, 22 So. 2d 625 (1945).

[12] Brinson v. Sandifer, 90 Miss. 41, 42 So. 89 (1906).

[13] Carothers v. Carothers' Estate, 227 Miss. 659, 86 So. 2d 855 (1956).

[14] Wilson v. Bridgeforth, 108 Miss. 199, 66 So. 524 (1914). *See also* McClendon v. Laird, 211 Miss. 662, 52 So. 2d 497 (1951).

[15] Myers v. Laird, 230 Miss. 675, 93 So. 2d 828 (1958).

[16] Beasley v. Beasley, 177 Miss. 522, 171 So. 680 (1937).

special consideration should be given in making certain that an interest vests presently in the grantee at the time of the instrument, and that proper delivery is made.

II. Survivorship Interests

The most prevalent example of a will substitute for personal property is probably the joint bank account with right of survivorship. The court seems to take the intention of the parties into the fullest consideration in allowing these interests to be given effect.[17]

In creating such an account, no precise form is essential. If formal deficiencies are accompanied by definite proof of an intention of the parties to create such an account, the intention will be given effect and the survivor will be held entitled to the fund. More evidence of such an intention, however, is required than merely an account in which the depositor deposits money in another's name subject to withdrawal on the depositor's signature.[18]

In a situation where joint tenancies with a right of survivorship in bank accounts are created by written instruments there seems to be no doubt that the survivor is entitled to the proceeds, free of the claims of the decedent's estate.[19] Where a certificate of deposit was made out in the name of the deceased or another, upon the death of the deceased the deposit became the property of the other and was not a part of the estate of the deceased.[20]

Although § 5205, Miss. Code Ann. (Supp. 1968) seems to be intended as a limit on liability for the benefit of banking institutions, this section has been used to show the validity of survivorship interests in joint bank accounts. The statute allows banks to pay any one of a group of depositors to a single account whether the other named depositors be living or not, "when a deposit has been made or shall hereafter be made in the name of two (2) or more persons, payable to any one (1) of such persons, or payable to any one (1) of such persons or the survivors, or payable to any one (1) of such persons or to any one (1) of the survivors . . . ."[21]

Such accounts have been given effect even when the survivor never drew on the account before the joint tenant's death.[22] And a nine year old daughter, as surviving joint tenant of funds in a federal saving and loan association, was held to be sole owner of an account of over $28,000.[23]

Certificates of time deposit as well as joint checking accounts have been held to be valid survivorship interests.[24] The court held that there is a presumption of their validity by virtue of § 5205 of the Mississippi

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[17] Stephens v. Stephens, 193 Miss. 98, 8 So. 2d 462 (1942).

[18] Leverette v. Ainsworth, 199 Miss. 652, 23 So. 2d 798 (1945).

[19] In re Ware's Estate, 218 Miss. 694, 67 So. 2d 704 (1953).

[20] Myers v. Laird, *supra* note 15.

[21] MISS. CODE ANN. § 5205 (Supp. 1968).

[22] In re Lewis Estate, 194 Miss. 480, 13 So. 2d 20 (1943).

[23] Stewart v. Barksdale, 216 Miss. 760, 63 So. 2d 108 (1953).

[24] Shearin v. Coleman, 201 Miss. 193, 28 So. 2d 841 (1947).

Code.[25] A deed of trust naming a husband and a wife or the survivor of them as beneficiary and a note executed to the order of a husband and wife or to the survivor of them was held to create a joint tenancy with right of survivorship, the provision for survivorship being strong evidence that a joint tenancy was intended.[26] And where it was shown by an unambiguous agreement that a joint tenancy with right of survivorship was intended in the contents of a safe deposit box, the court held that title to the contents vested in the surviving tenant with the burden of proof resting upon one claiming otherwise.[27] Another example is seen in the use of United States saving bonds. Such bonds, payable jointly to the decedent or to another party, were not a portion of the decedent's estate but became the absolute property of the surviving co-owner.[28]

III. Life Insurance

The use of life insurance is another method by which one may dispose of a portion of his wealth without court proceedings upon his death. Unlike some will substitutes, the insured may change the beneficiary at will and may maintain other controls over the policy before his death, retaining the ability to cash or borrow against the policy.[29]

It is apparently well settled that the beneficiary of a life insurance policy is entitled to proceeds of the policy free of any claims of the decedent's estate, a fact that qualifies the use of life insurance as a will substitute. A search of Mississippi cases yielded no case in which the court expressed an opinion as to whether the use of life insurance was a valid will substitute or an invalid testamentary disposition. Other jurisdictions, however, have held that the use of life insurance as a will substitute was not invalid as being testamentary in character.[30]

One Mississippi case, however, might provide a basis of argument cencerning the validity of the use of life insurance as a will substitute. In *Aetna Life Insurance Co. v. McCree*,[31] the court held that where recovery under an insurance policy was sought only for *disability benefits*, the right to these benefits vested in the *insured* on his becoming disabled, and where no other beneficiary was named at the time of the insured's death, his administrator was entitled to recover proceeds due under the policy. It is submitted that the contrary would have also been true: that if a beneficiary had been named, he would have been entitled to the proceeds to the exclusion of the administrator.

A situation might arise in which a party owing large debts purchases life insurance. Section 308 of the Mississippi Code exempts the proceeds of a life insurance policy that is payable to a named benefi-

[25] Miss. Code Ann. § 5205 (1942). (This section has now been amended as Miss. Code Ann. § 5205 (Supp. 1968) and seems to remain applicable.

[26] Vaughn v. Vaughn, 238 Miss. 342, 118 So. 2d 620 (1960).

[27] Duling v. Duling's Estate, 211 Miss. 465, 52 So. 2d 39 (1951).

[28] Myers v. Laird, *supra* note 15.

[29] Atkinson 161.

[30] Sigal v. Hartford Nat'l Bank & Trust Co., 119 Conn. 570, 177 A. 742 (1935); Kansas City Life Ins. Co. v. Rainey, 353 Mo. 477, 182 S.W.2d 624 (1944); In re Albert Anderson Life Ins. Trust, 67 S.D. 393, 293 N.W. 527 (1940).

[31] 174 Miss. 242, 164 So. 223 (1935).

ciary in the amount of $50,000 from the debts of the insured decedent.[32] This 1968 statute supercedes a similar statute[33] in which the exemption was $10,000. In construing the earlier statute the court held that out of the proceeds in excess of the exempted $10,000 the creditors are entitled to the *amount paid in premiums* on the entire policy while the decedent was insolvent.[34] It follows that the creditors would now be entitled (according to the $50,000 exemption in the present statute) to the amount, out of the proceeds in excess of $50,000, that was paid in premiums on the entire policy during the decedent's insolvency.

IV. Contractual Agreements

Contractual agreements are another variation of the will substitute. The court upheld the validity of an agreement providing that the survivor of two brothers was entitled to purchase stock from the decedent's estate at a fixed sum.[35]

A common example of the contractual agreement as a will substitute is the oral agreement in which the decedent promises to pay or bequeath property to another party for that party's care of the decedent during the last years of the decedent's life. Failure of the decedent to make such a will during his lifetime renders his estate liable in *quantum meruit* to the caring party.[36] Failure of the decedent to make such a payment during his lifetime also renders his estate liable in *quantum meruit*.[37]

As an illustration that contractual obligations have been held to be as binding on the decedent's estate as the will itself, attention is invited to the contract to make a will. Where a wife executed a contract to will to her husband and his issue one-third of her estate she could not, after his death, revoke this will and escape the obligations of the contract. The consideration for the contract was a release made by the husband of his right by statute[38] to renounce her will and receive one-half of her estate.[39]

It is felt that a contract to make certain *provisions* in a will is out of the area of the use of a contract as a will substitute. Thus no further situations will be considered here. Such use of the contract does, however, show the binding effect of the contract upon the disposition of the estate and illustrates that contracts may be given priority in conflicts between a contract and a will.

V. Gifts

Probably the most obvious of the will substitutes is the outright gift. Here, however, the party must make a present donation and be bound by the finality of this act.

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[32] MISS. CODE ANN. § 308 (Supp. 1968).

[33] MISS. CODE ANN. § 308 (1956).

[34] Johnson v. Bacon, 92 Miss. 156, 45 So. 858 (1908).

[35] Strange v. State Tax Comm., 192 Miss. 765, 7 So. 2d 542 (1942).

[36] Collins' Estate v. Dunn, 233 Miss. 636, 103 So. 2d 425 (1958). *See also* Hart v. Norton, 237 Miss. 566, 115 So. 2d 540 (1959).

[37] In re Hutchinson's Estate, 236 Miss. 507, 110 So. 2d 926 (1959).

[38] MISS. CODE ANN. § 668 (1956).

[39] In re Sadler's Estate, 232 Miss. 349, 98 So. 2d 863 (1957).

One type of gift used as a will substitute is the gift *inter vivos*. The elements of such a gift are a competent donor and donee, the intention to make a gift, delivery of the thing given, acceptance by the donee, and the gift going into effect immediately and absolutely. These elements were found present to constitute a valid *inter vivos* gift where a woman took an old man into her home, cared for him without remuneration and two days before his death took delivery from the man of an envelope containing nine $1,000 notes procured by him in a sale of his property for $1,000 cash and nine $1,000 notes.[40]

As stressed in the discussion of deeds, it seems that the areas with most frequent problems are those of making the gift in such a way that it has present effect and adequate deliverance. To establish a gift it must clearly appear that the donor has relinquished all dominion and that the donee has acquired all dominion over and control of the property.[41]

A promissory note payable on demand and given to the donee, instead of the decedent's providing for the donee in his will, was not valid as a gift. The note was completely void of consideration, and the court held that the note was merely evidence of the decedent's promise to make a gift. Since there was no delivery by the donor of the thing given (the money promised by the note), the instrument failed as a will substitute.[42]

Where the property is in the possession of the donee at the time the gift is made it is only necessary that the donor relinquish all dominion over the property to effect adequate delivery. Surrender of the property held by the donee back to the donor for redelivery is not necessary, and evidence showing that a symbolic delivery was made is sufficient to establish a completed gift *inter vivos*.[43] But the mere declaration that a gift was made was insufficient where the declaration was unaccompanied by acts showing delivery of possession or an absolute parting of all dominion and interest.[44]

The court has looked to the relationship between the donor and donee as one test of the evidence required to support a valid gift *inter vivos*. Where a fiduciary relationship existed between an alleged donee and the decedent, the making of a valid gift *inter vivos* was not established by mere possession by the fiduciary of certificates of corporate stock endorsed by the decedent.[45]

Another type of gift used as a will substitute is the gift *causa mortis*. This type of gift is made in contemplation of death and, unlike the gift *inter vivos*, is subject to revocation upon the recovery of the donor.[46] Although a gift *causa mortis* is always conditioned upon death, possession of the property must be delivered to and accepted by the donee during the donor's life. Unlike the gift *inter vivos*, the gift *causa*

[40] Maier v. Hill, 221 Miss. 120, 72 So. 2d 209 (1954).

[41] Comfort v. Smith, 198 Miss. 152, 21 So. 2d 584 (1945).

[42] Woods v. Sturges, 116 Miss. 412, 77 So. 186 (1918).

[43] Lacey v. Pelus, 198 Miss. 185, 22 So. 2d 239 (1945).

[44] Allison v. Allison, 203 Miss. 20, 33 So. 2d 619 (1948).

[45] Lindeman's Estate v. Herbert, 188 Miss. 842, 193 So. 790 (1940).

[46] ATKINSON 200.

mortis is subject to the rights of the donor's creditors if the estate is otherwise insufficient to satisfy the decedent's debts.[47]

It should be noted that some gifts made during a donor's illness are not necessarily gifts *causa mortis* subject to revocation upon the donor's recovery. If it is shown that a gift made during the donor's last illness was made to take effect irrevocably and unconditionally, whether the donor lives or dies, the gift probably will be deemed to be a gift *inter vivos*.[48]

It is essential in making a gift *causa mortis* as it is in making a gift *inter vivos* that the property be delivered in such a manner that the donor retains no dominion or control over the property. Where a decedent had left money with a bank cashier to be sent to an organization by the cashier in the event of the donor's death, the attempted gift *causa mortis* failed, because the cashier had placed the money to the credit of the decedent where it could have been withdrawn at any time by the decedent, before her death, without liability on the part of the bank to the organization.[49]

In *Pace v. Pace*[50] the delivery of the donor's bank book to the donee was not sufficient to sustain a gift *causa mortis* of the proceeds of the account, since in such a gift there must be a legal delivery of the thing (money) given.[51] Twenty-two years after this decision the Mississippi Supreme Court observed in *Gidden v. Gidden*[52] that Mississippi was the only state adhering to a rule that delivery of a deed of gift was not sufficient to convey title to the thing given without actual delivery.[53] In that case a gift *causa mortis* by deed failed, because the thing given (cotton) was not delivered to the donee.

Later the court seemed to weaken the Mississippi rule by upholding the validity of a gift by deed to all real and *personal* property at the donor's residence, because the deed had been acknowledged and recorded and because a symbolic delivery of some of the personal property had been made.[54]

Recently, however, the court denied the validity of a gift of money by check which was not cashed until after the maker's death by holding that a gift *inter vivos* must be perfected by delivery, and a gift *causa mortis* must be made in contemplation of death. As authority for this decision the court cited the *Pace* and *Gidden* cases, both of which had held that attempted gifts *causa mortis* were unperfected without delivery of the thing given.[55] It seems then that, although the court has failed to explain its present position on the necessity of delivery of the thing given in a gift *causa mortis*, the safest advice in employing either a gift *inter vivos* or a gift *causa mortis* is to make certain that the *thing* given

[47] Johnson v. Grice, 140 Miss. 562, 106 So. 271 (1925).

[48] Wilson v. Jourdan, 79 Miss. 133, 29 So. 823 (1901).

[49] Yates' Estate v. Alabama-Miss. Conference Ass'n of Seventh Day Adventists, Inc., 179 Miss. 642, 176 So. 534 (1937).

[50] 107 Miss. 292, 65 So. 273 (1914).

[51] *Id.* at 299, 65 So. at 274.

[52] 176 Miss. 98, 167 So. 785 (1936).

[53] *Id.* at 110, 167 So. at 790.

[54] Howell v. Ott, 182 Miss. 252, 180 So. 52 (1938).

[55] Gilder v. First Nat'l Bank of Greenville, 214 So. 2d 681 (Miss. 1968).

is adequately delivered with the donor completely divesting himself of all dominion and control.

VI. Bank Account Trusts

Another will substitute utilizing a bank account is the bank account trust. Such a trust may arise when one party makes a deposit "in trust for" another. Legal obstacles arising in such a situation are the questions of whether a trust was intended to be created and whether the arrangement is violative as being testamentary in character.[56]

As to the intention of the party to actually create a trust, it is possible that he simply wished to conceal his pecuniary condition to others. The question of whether the device is invalid as an attempted testamentary disposition is to be answered by the amount of control the grantor retained over the trust.[57]

The court has held that a perfected parol trust was created where a party made a time deposit to the order of himself and another, informing the cashier at the time of deposit that it was his desire that the money go to the other party upon his death with the interest to be paid to himself until his death. The equitable title to the proceeds was held to have vested presently in the beneficiary to be enjoyed in the future. Further, the court held that such a trust may be either revocable or irrevocable by its terms, and if revocable but not revoked it was enforceable at the settlor's death.[58] A parol trust was also created where certificates of deposit were made payable to a father or his child with evidence of interest in providing for their education.[59]

The above cases are to be compared with the case of *In re Totten*[60] which established the tentative trust doctrine permitting the depositor trustee to withdraw funds during his lifetime, but allowing the beneficiary to have the remainder at the death of the trustee. Although the *Totten* case was not mentioned in either of the above cases, it seems that the tentative trust doctrine might find acceptance in Mississippi.

VII. Living Trusts

A broader use of the trust agreement is in the conveyance of realty or personalty upon a trust for the benefit of a third person upon the settlor's death. The agreement may reserve income to the settlor for his lifetime or even the right of complete withdrawal or revocation by the settlor, *but as in other will substitutes, an interest must be created presently.* Unlimited control over the administration of the property by the settlor will deem the transaction to be testamentary in nature. The settlor, however, may relinquish all control to the property in trust and still retain the power to revoke the trust in whole or in part. Again, it should be emphasized that whether the trust is of short or long duration, subject to revocation or irrevocable, an interest should be divested

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[56] Atkinson 174

[57] *Id.* at 174-75.

[58] Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1922).

[59] Williams v. Bailey, 174 Miss. 760, 165 So. 439 (1936).

[60] 179 N.Y. 112, 71 N.E. 748 (1904).

from the settlor and vested in another at the time of creation of the trust for the transaction to be deemed an effective will substitute.[61]

A deed in trust, conveying premises on the condition that the grantees manage and account to the grantor during his life and upon his death convert the *corpus* into cash and distribute the cash to the grantor's heirs according to the laws of intestacy, was held to be a valid transaction and not invalid as being testamentary in character.[62]

The above case seems to be one of a few cases, if not the sole case, in which the living trust has been questioned in Mississippi as an invalid testamentary disposition. Although other cases[63] have upheld the validity of living trusts created by grantors who subsequently died, these cases do not seem directly related to the discussion of will substitutes, since they do not raise the question of possible testamentary character. It seems, however, upon the authority of the case holding that the transaction was not testamentary, that such a living trust could be a useful will substitute.

Douglas H. Lefeve

[61] ATKINSON 177-81.

[62] Bryant v. Sevier, 197 Miss. 457, 20 So. 2d 582 (1945).

[63] Hart v. First Nat'l Bank of Jackson, 233 Miss. 766, 103 So. 2d 406 (1958); George v. Adams, 141 Miss. 144, 106 So. 359 (1925).

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BALLENTINE'S LAW DICTIONARY.
Edited by William S. Anderson. Rochester, N.Y.: Lawyer's Co-op, 1969. Pp. 1429. $20.00.

This dictionary contains, as most do, a key to pronunciation, a dictionary with pronunciations, and abbreviations of legal reports, treatises, and phrases. Its great value lies in its date of publication, 1969. The citations given are as recent as possible. If cases or statutory definitions are not available, citations are given to Am. Jur. 2d and ALR. The publisher's claim is that there are 30,000 words and phrases including over 3,000 not found in the previous 1948 edition. For example, "test explosion" is defined as "a nuclear explosion detonated on an experimental basis." 6 Am. Jur. 2d Atomic Energy § 48. All in all this dictionary must be classified as among the best, certainly it is the most recent and up to date.

THE DICTIONARY OF LEGAL QUOTATIONS.
James William Norton-Kyshe. Detroit: Gale Research Company, 1968. Pp. xxii + 344. $8.50.

It may be safely stated that quotations from famous (or infamous) judges usually enhance the readability of written works. This dictionary concentrates on the witticisms and statements of the older jurists. At the front one finds listings of subjects and the chancellors and judges quoted. The work is beautifully cross-referenced and adequately indexed. Many sayings are famous and many are humorous; others purport to be in that category. Most are wise and significant. Some, on the other hand, show poor judgment. As for famous sayings: "It is better that ten guilty persons escape than one innocent suffer."—Sir William Blackstone. "Nominal charges are in effect, only a peg to hang costs on."—Maule, J. Information on each quotation is given. The author and source follow the quotation. Footnotes furnish background matter, classifications and guides to parallel cases. Essentially, this is an above average work of its kind. The main complaint would have to be the antiquity of the quotations. (The book was first printed in 1904.)

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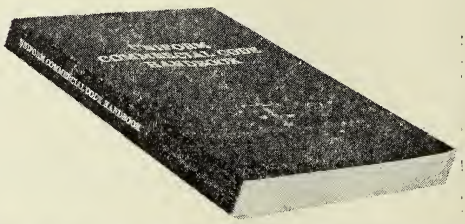

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